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N. 2925

No. 14646

United States Court of Appeals

For The Ninth Circuit

JOE MIKE AYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

ELLIOTT AND MURRAY,
WILLIAM L. MURRAY, ESQ.,
206 West Fourth Street,
Santa Ana, California.
Attorneys for Appellant.

SOUTH MAIN PRINTERS, 1924 SOUTH MAIN STREET, SANTA ANA, CALIFORNIA

SUBJECT INDEX

TABLE OF AUTHORITIES

No. 14646

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JOE MIKE AYERS,

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APPELLANT'S OPENING BRIEF

I. JURISDICTIONAL BASIS OF APPEAL

Appellant was indicted for refusal to be inducted into the armed forces of the United States. The indictment appears at pages 3-4 of the Transcript of Record herein. The facts alleged in the indictment are sufficient to charge Appellant with an offence against the United States, as such offence is defined by Section 12 of the Universal Military Training and Service Act, 50 U.S.C.A. Appendix, Sec. 462. The District Court had jurisdiction of such offence by virtue of the provisions of Section 3231, Title 18, U.S.C.A. The District Court, following trial by the court, found Appellant guilty as charged in the indictment, adjudged him convicted of a violation of 50 U.S.C.A. Appendix, Sec. 462, and sentenced him to be committed to the custody of the Attorney General for a period of imprisonment. This judgment and sentence of that court

appears in the Transcript of Record at pages 13-14. Jurisdiction of this court over an appeal from the foregoing judgment and sentence of the District Court is provided by Section 1291 of Title 28, U.S.C.A. Pursuant to Rule 37(a) of the Federal Rules of Criminal Procedure, Appellant took an appeal by filing with the clerk of the District Court a Notice of Appeal in duplicate. The Notice of Appeal is set out at pages 15-16 of the Transcript of Record.

II. STATEMENT OF THE CASE

Appellant Joe Mike Ayers was found guilty of a violation of the Universal Military Training and Service Act, 50 U.S.C.A. Appendix, Sec. 451 et seq., in that he knowingly refused to submit to induction. Trial was by the court, in the United States District Court for the Southern District of California.

There is no dispute as to the facts of this case. The facts are found in Ayers' Selective Service file. A copy of this file, in the original form in which it was introduced into evidence at trial as Government's Exhibit 1, is a part of the record on appeal herein.[1]

Ayers registered for Selective Service with Local Board No. 140 in San Diego, California, on August 30, 1948. Initially, the local board classified him 1-A, on July 11, 1950. He then notified the local board that he was a student preparing for the ministry; and, on October 27, 1950 the local board reclassified him 1V-D.

The 1V-D classification was continued until early in 1953. On February 18, 1953 Ayers wrote to the local board stating that he was a "conscientious objector" and request-

[1]This exhibit was the only evidence introduced at trial by the Government. See Minutes of the Court, Nov. 23, 1954, at page 9 of the Transcript of Record and Stipulation at pages 21-22 of the Transcript of Record.

ing that he be furnished the Selective Service form required of registrants who claim to be conscientiously opposed to participation in war. On the same day the local board wrote to Ayers requesting information as to his current scholastic activities. Thereafter, Ayers answered by letter the questions of the local board pertaining to his studies and completed and filed with the local board SSS Form No. 150, wherein he stated the nature and basis of his conscientious objection to participation in war. On March 4, 1953 the local board reclassified him 1-A.

On March 19, 1953, Ayers personally appeared before the local board and explained his reasons for claiming to be a conscientious objector, and the local board then reclassified him 1-O. On April 24, 1953 the local board received a letter from R. R. Sanders, Captain, USAF, Coordinator of District 6 of Selective Service System, informing the local board that Ayers was not entitled to a 1-O classification..[2] Without notice or further hearing, the local board reclassified Ayers 1-A on May 7, 1953.

It is contended that this reclassification of Ayers from 1-O to 1-A was invalid. Invalidity is urged upon the grounds that such reclassification was: (1) based upon an erroneous interpretation of the statute and regulations; (2) made contrary to Selective Service regulations; (3) effected in a manner which denied Ayers due process of law; and (4) an arbitrary and capricious act lacking any supporting evidence. It is further contended that the effect of this reclassification was to deny Ayers substantial rights, which denial was not cured by the subsequent appeal to a Selective Service appeal board.

After Ayers received notice from the local board that he had been reclassified from 1-O to 1-A, he requested

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[2]This letter is hereinafter set out in full as "Appendix A."

another personal appearance before the board. This was granted, and on May 21, 1953 Ayers again personally appeared before the board to discuss his conscientious objection to participation in war. However, the board continued him in a 1-A classification.

It is contended that the local board, when it classified Ayers 1-A after his second personal appearance before it, failed to comply with Selective Service regulations by not adequately considering whether he should be classified 1-A-O. This furnishes an additional ground for asserting the invalidity of Ayers' 1-A classification and the induction order based thereon.

Ayers took an appeal from the 1-A classification made by his local board on May 21, 1953. His Selective Service file was forwarded to the appeal board, which in turn referred the file to the Department of Justice for an advisory recommendation. Thereafter, Ayers was given a hearing before a hearing officer and an investigation was made. Both the hearing officer and the Department of Justice recommended that Ayers claim to exemption from both combatant and non-combatant military service be not sustained. On April 15, 1954 the appeal board classified Ayers 1-A. It is contended that this classification was without basis in fact.

Subsequently Ayers was ordered to report for induction and obeyed the order to report. However, he refused to take the oath and to be inducted. Thereafter he was indicted.

A jury was waived and the matter was tried by the court, the Honorable James M. Carter presiding. The Government introduced into evidence as Government's Exhibit 1 a copy of Ayers' Selective Service file and an accompanying

stipulation.[3] The Government then rested its case. This appears in the minutes of the court for November 23, 1954, which appear at pages 9-10 of the Transcript of Record. Ayers moved for a judgment of acquittal at the close of the Government's case and renewed this motion at the end of his own case. This also appears from the minutes of the court appearing at pages 9-10 of the Transcript of Record. The Motion for Judgment of Acquittal appears at pages 10-11 of the Transcript of Record. The court denied Ayers' motion and found him guilty as charged.

On December 13, 1954 Ayers again moved for judgment of acquittal or in the alternative for a new trial. This motion was denied. This appears in the minutes of the court for that day, which are set out at pages 12-13 of the Transcript of Record. A judgment of conviction and a sentence of imprisonment were imposed by the court on December 13, 1954. This judgment and sentence is set out in the Transcript of Record at pages 13-14.

Ayers filed his notice of appeal on December 20, 1954. The notice is contained in the Transcript of Record at pages 15-16. Ayers is presently admitted to bail pending appeal, as appears from the order of the court at page 16 of the Transcript of Record. On January 21, 1954 the court extended Ayers' time within which to file the record on appeal until February 8, 1955. This order appears at pages 17-18 of the Transcript of Record. The certificate of the Clerk of the District Court appears at pages 18-19 of the Transcript of Record, where it appears that the record of appeal was filed in this court on February 8, 1955.

On March 5, 1955 there was filed in this court a stipulation to the effect that the only evidence introduced by the

[3]As noted in footnote No. 1, the Exhibit is a part of the record herein. The stipulation appears at pages 6-8 of the Transcript of Record.

Government at trial was Government's Exhibit 1. This stipulation was filed for the purpose of clarifying the record and it is set out at pages 21-22 of the Transcript of Record.

III. SPECIFICATION OF ERRORS

Appellant specifies as the errors upon which he relies the following:

1. The District Court erred in denying Appellant's Motion for Judgment of Acquittal made at the time of trial, on November 23, 1954.

2. The District Court erred in finding Appellant guilty as charged in the indictment. The evidence is insufficient to support a finding of guilt.

IV. ARGUMENT

A. Summary of Argument

Ayers is not guilty of a crime. The trial court was in error twice. It erred when it denied Ayers' Motion for Judgment of Acquittal. It erred when it found him guilty as charged in the indictment.

The order to Ayers to report for induction was void because it was based upon an invalid classification of 1-A. That classification is invalid for two reasons.

Ayers was denied a fair chance for his proper classification on his personal appearance before his local board. This contention is urged upon the following grounds:

(1) The local board applied an erroneous interpretation of law in considering Ayers' classification;

(2) The local board violated Selective Service regulations by reopening Ayers' classification and changing it from 1-O to 1-A;

(3) The local board denied Ayers due process of law by denying him access to the information which was used as the basis for his reclassification and by allowing a member of the military to substitute his judgment for that of the local board.

(4) The local board failed to properly consider the question of whether Ayers should be classified 1-A-O.

The 1-A classification given Ayers was also invalid because it was without basis in fact. The record shows that the local board did not doubt the genuineness and sincerity of Ayers' claim to be a conscientious objector, but that it decided that even though he was sincere he must be classified 1-A. The record contains no affirmative evidence which would support the denial of the claimed classification of 1-O. Therefore, the 1-A classification made was without basis in fact.

B. Ayers' order to report for induction was void because the local board, in effect, denied him a hearing upon his claim to be classified as a conscientious objector.

The local board failed to give Ayers a fair hearing. His last personal appearance before the local board, on May 21, 1953, was the same as no hearing at all.

This court has pointed out in *White v. United States,* 9 Cir., 215 F.2d 782, and reiterated in *Franks v. United States,* 9 Cir., 216 F.2d 266, and *Shepherd v. United States,* 9 Cir., 217 F.2d 942, the vital importance of the personal appearance before the local board in the procedure for classifying a Selective Service registrant who claims to be conscientiously opposed to participation in war. A registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied something which cannot be cured through the ac-

tion of the appeal board. *Knox v. United States,* 9 Cir., 200 F.2d 398, *Franks v. United States,* supra.

To fully comprehend the scope and effect of the hearing given Ayers by the local board it is necessary to examine local board action during the period from March 19, 1953 to and including May 21, 1953. Ayers had two personal appearances before his local board. The first was on March 19, 1953; the second was on May 21, 1953.

1. The local board applied an erroneous theory of law in classifying Ayers.

After the first personal appearance the local board classified Ayers 1-O. At the time of this appearance the local board had the opportunity to judge of the genuineness, the sincerity and the extent of Ayers' conscientious objection to military service. The board then accepted the genuineness and sincerity of his conscientious objections to participation in both combatant and non-combatant military training.

Then the letter from Captain Sanders, USAF, entered the picture.[4] The local board received this letter on April 24, 1953, and on May 7, 1953 it reopened Ayers' classification and classified him 1-A. The record is devoid of any evidence, other than this letter from Captain Sanders, upon which the board could have acted. Further, the written summary of Ayers' second personal appearance before the board affirmatively shows that the board was influenced by that letter.[5]

Captain Sanders, in a peremptory tone, informed the local board that Ayers' 1-O classification was unwarranted

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[4]See Appendix A.

[5]The written summary of that personal appearance is hereinafter set out in full as "Appendix B."

under the regulations because another Selective Service registrant who belonged to the same religious organization as Ayers was to be classified 1-A by another local board at some future time. Captain Sanders' interpretation of the regulations was erroneous.

The purported statements of fact contained in the letter from Captain Sanders do not concern Ayers as an individual; they refer to the religious organization to which he belongs. Neither the statute nor the regulations requires a conscientious objector to belong to a religious sect or organization meeting specified standards. *United States v. Alvies,* D.C. N.D. Calif., 112 F.Supp. 618, and cases there cited.

The statutory language creating the exemption from military training for conscientious objectors phrases the test for exemption in terms of the individual's belief not his membership in a sect or organization. Section 6 (j) ,Title I of the *Universal Military Training and Service Act,* 50 U.S.C.A. Appendix, 456 (j), in so far as it is here material, provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code . . . "

Selective Service Regulations, Title 32, Sec. 1622.1 (d) provide:

> "In classifying a registrant there shall be no discrimination for or against him because of his race,

> creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

It is apparent from the summary of Ayers' second personal appearance that the board accepted and adopted Captain Sanders' erroneous interpretation. It is there stated, "Board Members explained his views were contrary to our beliefs, and *according to the Selective Service Regulations he could not be considered in any other classification but 1-A.* Therefore, the board could not change his classification." (Emphasis Supplied)

It is submitted that these facts put the Ayers case in the same class with *United States v. Hagaman,* 3 Cir., 213 F.2d 86; *Hinkle v. United States,* 9 Cir., 216 F.2d 8; and *Shepherd v. United States,* supra, where the courts concluded that board action was based upon an erroneous view of the law and not upon any disbelief on the honesty and sincerity of the registrant. In *Shepherd v. United States,* supra, it was held that a hearing before a Department proceeding upon an erroneous theory of law is no better than no hearing at all. In that case, this court, in commenting upon the probability that an appeal board had followed a Department of Justice recommendation based upon an erroneous interpretation of law, said at page 945:

> " . . . On the other hand, we cannot close our eyes to the strong probability that the appeal board, no doubt composed of laymen, would be much influenced by such a statement of the Department of Justice recommending that even if the registrant was sincere he could not be exempted because of his expressed beliefs relating to self defense and theocratic wars."

The present case, it is submitted, is on all fours with the Shepherd case with respect to the probability that the hearing proceeded upon an erroneous interpretation of the law. Captain Sanders was an official in the Selective Service System, the Coordinator of District 6. Considering the letter alone, it seems highly probable that the local board, "no doubt composed of laymen," would be much influenced by an opinion from a high-level Selective Service official. But the minutes of the local board remove any doubt as to the influence. They demonstrate that Captain Sanders' interpretation of the regulations became the interpretation of the local board.

When the local board considered only Ayers' demeanor and sincerity at the time of his first personal appearance, it classified him 1-O. But, at the second personal appearance, when there had been added to the considerations influencing the board the erroneous interpretation of the regulations, he was classified 1-A. Thus, the local board in effect deprived Ayers of a fair hearing upon his claim to classification as a conscientious objector.

2. The local board acted contrary to regulations by reopening and reconsidering Ayers' classification.

The local board acted in excess of its jurisdiction when it reopened Ayers' classification on May 7, 1953. This reopening and reconsideration of Ayers' classification was void because it was a violation of *Selective Service Regulations,* Title 32, Sec. 1625.2, which, in so far is here material, provides:

> "The local board may reopen and consider anew the classification of a registrant . . . (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; . . . "

As pointed out above, the record is devoid of any evidence except the Sanders' letter upon which the local board could have acted in reopening Ayers' classification. That letter contains no facts which, if true, would justify a change in his classification. Even, assuming the truth of the facts concerning the religious organization to which Ayers belonged, there was no basis for changing his classification. The test for conscientious objector classification is the individual's personal views and belief, not his membership in a given sect or organization, for the reasons stated earlier in this discussion.

This reopening of Ayers' classification, contrary to the regulations, rendered the new classification of 1-A void. This rule was stated in *United States v. Fry,* 2 Cir. 203 F.2d 638, where it was said:

> "Selective Service regulations contain substantial rights and failure to act in conformity thereto on part of local board is denial of due process which renders 1-A classification a nullity."

This rule was reaffirmed by the Court of Appeals for the Second Circuit in *United States v. Vincelli,* 2 Cir., 215 F.2d 210, and was followed by this court in *Knox v. United States,* supra, and *Franks v. United States,* supra.

3. The local board denied Ayers access to the information which was the basis of his reclassification.

The record shows that Ayers was not given access to the information in Captain Sanders' letter. The local board, after receiving that letter, reopened Ayers' classification and reclassified him 1-A without prior notice or hearing. The summary of the second personal appearance contains no reference to the facts contained in that letter.

Ayers had no opportunity to set forth facts concerning his religious organization or its effect upon his religious training and belief and conscientious objections to participation in war. It is immaterial that the "new information" was not a valid basis for reopening his classification. If it was in fact the basis for reopening he should have had the opportunity to explain it and to offer evidence to overcome its effect. Failure to give him such an opportunity was a denial of due process. *Sheats v. United States,* 10 Cir., 215 F.2d 746; *Breuer v. United States,* 4 Cir., 211 F.2d 864; U. S. ex rel *Levy v. Cain,* 2 Cir., 149 F.2d 338.

4. The local board acted arbitrarily and capriciously and without basis in fact in reclassifying Ayers.

The 1-A classification given Ayers by the local board was void for still another reason. The reclassification from 1-O to 1-A was arbitrary and capricious action, without basis in fact.

The facts concerning this action by the local board are almost identical with those in the case of *Ex parte Asit Ranjan Ghosh,* D.C. S.D. Calif., 58 F.Supp. 851, appeal dismissed 148 F.2d 822. In that case the petitioner had been classified 4-C, a citizen of a foreign country, by his local board. As was the practice, his local board, at his request, issued to him a certificate of non-residence. This certificate was subsequently renewed twice. Thereafter, the State Director of Selective Service wrote to the local board that, "Consequently, it would seem that he is no longer entitled to exemption in accordance with the policy laid down by national headquarters for causes of this kind. . . ." (Footnote No. 1 at page 852 of the opinion.) Following receipt of this letter, and with no other evidence before it, the local board summarily canceled the certificate of non-residence and classified Ghosh 1-A.

In the Ghosh case the court granted a writ of habeas corpus, saying, at page 857:

> "The only additional thing before the board on March 10th, was a letter from the State Director of March 1, 1944, the effect of which was to peremptorily suggest to the board that they recall and cancel petitioner's certificate of non-residence. . . . And the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards. . . . My view is that it points up to no other conclusion than that the local board acted on March 10th without any supporting evidence and, I might say, in an arbitrary and capricious manner."

The court further pointed out in the Ghosh opinion that Congress intended to keep selective service classification of individuals out of the hands of the military. Then, as now, members of the armed forces were prohibited from serving on selective service boards.

Under the law, Ayers was entitled to have his claim for exemption heard by a board of civilians, his neighbors.[6] But, he was in fact classified by Captain Sanders, a military man. The local board set aside its own, independent determination that Ayers should be classified 1-O and substituted therefor Captain Sanders' determination that he

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[6]In *Knox* v. *United States*, 9 Cir., 200 F.2d 398, the court said, at page 401:

> "Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claim considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities."

should be classified 1-A. This is still another reason why Ayers was denied a fair hearing before the local board.

When the local board reclassified Ayers from 1-O to 1-A it failed to properly consider whether he should be classified 1-A-O. Such failure by the local board is a violation of the regulations which renders a subsequent induction order invalid. *Franks v. United States,* supra. The facts of this case, it is submitted, clearly indicate that the rule of the Franks case applies.

In the Franks case this court decided that the record failed to prove that the local board had fully considered a 1-A-O classification where its minutes stated, " . . . Franks did not want consideration as a 1-A-O. Board voted unanimously that Franks should be classified 1-A as in accordance with Selective Service Regulations they could not consider and did not consider him a true Conscientious Objector as described in the Regulations . . . "

Here, the record is equally clear that the local board failed to fully consider a 1-A-O classification. The minutes of the local board covering Ayers personal appearance on May 21, 1953, state, inter alia:

> "The above named registrant appeared before the members of the local board to appeal his 1-A Classification. He claims to be a conscientious objector to war in any form.
>
> "He had appeared before the Board Members on March 19, 1953. He was asked if he felt the same about his religious beliefs. He said he did. Board Members explained his views were contrary to our beliefs, and according to the Selective Service Regulations he could not be considered in any other classification but 1-A. Therefore, the board could not change his classification . . . "

Be it remembered that subsequent to Ayers personal appearance before the board on March 19, 1953 he was asked if he felt the same about his religious beliefs as on that date, and he replied affirmatively. Then the board explained that he could not be classified other than 1-A.

From the record it can logically be inferred that the board not only failed to fully consider a 1-A-O classification, but failed to consider it at all. Until the board received the letter from Captain Sanders it felt that Ayers should be classified 1-O. But after it received that letter, it leap-frogged any consideration of a 1-A-O classification and applied the Sanders' erroneous interpretation and classified Ayers 1-A.

Reduced to its simplest form, the foregoing argument is that the letter from Captain Sanders prevented Ayers from having a fair hearing before his local board. That letter interjected an erroneous theory of law into the classification procedures applied to Ayers. The record is clear that the board accepted and adopted this erroneous interpretation. The local board violated Selective Service Regulations by reopening and reclassifying in the first place, and by failing to fully consider a 1-A-O classification once it had undertaken to reclassify. The board acted arbitrarily and capriciously in reclassifying and gave Ayers no opportunity to meet and defend against the information which was the basis for reclassifying. All this was a denial of due process. The authorities cited above establish that the induction order directed to Ayers was invalid.

Nor did the appeal cure the action of the local board. This court made the rule clear in *Franks v. United States,* supra, where it said, at pages 270-271:

> " . . . Therefore a registrant who fails to have a fair chance for his proper classification on his appearance

before the local board has been denied something which cannot be cured through the action of the appeal board. Such was our holding in Knox v. United States, 9 Cir., 200 F.2d 398."

C. Ayers' order to report for induction was void because his 1-A classification was without basis in fact.

There is still another reason why the order to Ayers to report for induction was void. That order was based upon an invalid classification of 1-A. There is no basis in fact for such a classification.

This court has announced the standards which should be applied in determining whether or not there was a basis in fact for denying a classification as a conscientious objector in *White v. United States,* supra, and *Pitts v. United States,* 9 Cir., 217 F.2d 590. In the White case it was held that the rule of *Dickinson v. United States,* 346 U.S. 389, 98 L.ed. 132, 74 S.Ct. 152, does not apply in a case where the local board has rejected a claim of conscientious objection after a personal appearance before the board when it can be inferred that the board's conclusions have been based upon the demeanor and apparent credibility of the registrant. But, in the Pitts case it was held that when it cannot be inferred that the local board rejected a claimed classification as a conscientious objector because it doubted the sincerity of the registrant or the genuineness of his claim that the principles of the Dickinson case must be applied.

The Dickinson case requires a reviewing court to search the record for some affirmative evidence to support the denial of the classification claimed by the registrant, and holds that absent such evidence there is no basis in fact for denying the classification claimed if the registrant has made a prima facie case for entitlement thereto.

It is submitted that the Ayers' situation is one requiring the application of the principles of the Dickinson case, under the rule of the Pitts case. Ayers made a prima facie case for his entitlement to a 1-O classification by filing with the board SSS Form 150 and written statements of his religious beliefs with respect to participation in war. Copies of these documents are in Government Exhibit 1, included in the record herein in original form.

Ayers did more than establish a prima facie case, however. By virtue of his first personal appearance before the local board he convinced the board that he should be classified 1-O. It cannot be inferred that the local board reclassified him 1-A because it doubted his sincerity at the second personal appearance. The only reasonable inference is that the local board was acting under the erroneous impression that even though Ayers was sincere in his objections that he must be classified 1-A because Captain Sanders had told the board that the regulations required such a classification.

Applying, then, the rule of the Dickinson case, what affirmative evidence is there in the record to support a denial of a 1-O classification? It is respectfully submitted that the answer to that question is "None."

Certainly Captain Sanders' letter is not evidence which supports a denial of a 1-O classification, for the reasons pointed out in previous discussion. The summary of the second personal appearance contains no reference to anything which could be considered evidence to support a denial.

The only other material matter which entered the file between the time of the first personal appearance, when Ayers was classified 1-O, and the classification by the appeal board was the recommendation of the Department of Jus-

tice. The import of that recommendation is that the claimed classification should be denied because Ayers was not as articulate as the hearing officer felt he should have been.

But even assuming that Ayers failed to say enough to make a prima facie case for entitlement to a 1-O classification at the time of his appearance before the hearing officer, such fact is not affirmative evidence which will support a denial. Ayers made his prima facie case before he reached the hearing officer stage of the proceeding. Viewed as evidence, the most that can be said for the report is that it was a lack of evidence by Ayers. It is negative, not affirmative evidence; and it will not support a denial.

Incorporated by reference into the Department of Justice recommendation was a resume of the investigative report. That report contained summaries of interviews with people who were acquainted with Ayers. Opinions as to his sincerity varied. Though most of the people interviewed believed him to be sincere, some did not. But the statements of such opinions are not a proper evidentiary basis for denying a claimed classification. *Annett v. United States,* 10 Cir., 205 F.2d 689; *United States v. Close,* 7 Cir., 215 F.2d 439. As was said in the Annett case, at page 691, "To merely state that he does not consider him sincere without giving a single fact upon which such belief is predicated does not rise to the dignity of evidence."

This court has ruled in *Franks v. United States,* supra, that in a criminal prosecution of this kind, the burden is upon the Government to establish a valid induction order. And in *Shepherd v. United States,* supra, this court decided that, in a criminal case, the presumption that official action has been regularly performed is insufficient to overcome the likelihood of erroneous action by a Selective Service board when the record discloses such likelihood.

This is a criminal prosecution. The foregoing principles apply. And, as further stated in the Franks case, supra, where the matters complained of having a bearing upon the validity of the induction order, the reviewing court must view the record in the light most favorable to the registrant.

So viewed the record discloses no affirmative evidence to support a denial of a 1-O classification. Without such evidence there is no basis in fact for the classification of 1-A and a conviction of refusal to submit to induction in obedience to an induction order based on such classification must be reversed. *Dickinson v. United States,* supra; *Pitts v. United States,* supra.

D. Conclusion

The evidence of the invalidity of the induction order was before the trial court as Government Exhibit 1, which is included in this record in its original form. Therefore, it was error for the trial court to deny Ayers' Motion for Judgment of Acquittal and to find him guilty. Accordingly, the judgment of the District Court should be reversed.

Dated, Santa Ana, California,
April 15, 1955.

Respectfully submitted,

ELLIOTT AND MURRAY,
WILLIAM L. MURRAY, ESQUIRE,
Attorneys for Appellant

APPENDIX A.

SELECTIVE SERVICE SYSTEM

DISTRICT HEADQUARTERS NO. 6
3972 Main Street
RIVERSIDE, CALIFORNIA

(Stamp of Local Board)

23 April 1953

Selective Service System
Local Board No. 140
525 "E" Street
San Diego, California

LOCAL BOARD NO. 140
San Diego County
April 24, 1953
Room 222, 525 E Street
San Diego, California

Subjects: AYERS, Joe Mike, SS No. 4-140-29-496
International Christian Revival Association

Gentlemen:

The subject registrant has been given a classification of 1-O because he claims membership in the subject religious organization, which is located at 1841 W. Palmyra Street, Orange, California.

It so happens that Local Board No. 135, Santa Ana, has recently made an investigation of this organization because one of their registrants is also claiming to be a conscientious objector, and eligible for Class 1-O.

The investigation revealed that this organization has, at present, only some 20 members, and that they are supervised by Mr. George E. Andrus, 5742 E. Thelma Avenue, Buena Park, California. Mr. Andrus was contacted this date, and stated that he was ordained in 1946. He is em-

ployed as a teacher in the Santa Ana Junior College. H advised that subject religious organization was incorpo ated in 1951, and verified a statement made by the Sant Ana registrant that the group decided, on 18 Novembe 1952, that they were conscientiously opposed to war an on that date, passed a resolution to that effect.

In view of the above, it would appear that a classificatio of 1-O is not warranted under the provisions of Sectio 1622.14 of Selective Service Regulations.

For your information, the Santa Ana registrant belon ing to this organization is, at the present time, a full-tim student and is in a student's classification. It is the intentio of Local Board No. 135 to place him in Class 1-A when h no longer qualifies for a student's classification.

Very truly yours,

R. R. SANDERS
R. R. Sanders
Captain, USAF
COORDINATOR, DISTRICT 6

rrs:lrk

APPENDIX B.

ERSONAL APPEARANCE MAY 21, 1953

YERS, JOE MIKE SS NO. 4-140-29-496

The above named registrant appeared before the members of the local board to appeal his 1-A Classification. He laims to be a conscientious objector to war in any form.

He had appeared before the Board Members on March 9, 1953. He was asked if he felt the same about his religious beliefs. He said he did.

Board Members explained his views were contrary to ur beliefs, and according to the Selective Service Regulaons he could not be considered in any other classification ut 1-A. Therefore, the board could not change his assification.

In that event he asked that his file be sent on to the oard of Appeals, for their consideration. Before this is one however, he wished to place in writing his religious eliefs so that all that information could accompany his le to the Board of Appeal.

Registrant also asked that his Board be transferred to ong Beach, Calif. Members explained that this could not e done. However, he could request transfer to that area, f his inductions, personal appearances, etc., in the future he so wished.

Board agreed to wait for further information from the egistrant before forwarding his file to the Board of Appeal.

JOSEPH LEVIKON

. A. HAISCH

lerk, Local Board No. 140

-21-53

No. 14646.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE MIKE AYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,
Chief, Criminal Division,

RICHARD L. SULLIVAN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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STATUTES

No. 14646.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OE MIKE AYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

The Indictment in this case was returned and filed on October 13, 1954 in the United States District Court for the Southern District, Central Division of California, and charged the appellant with the violation of Section 462, Title 50, App., United States Code [Tr. pp. 3, 4].[1]

On November 23, 1954, the case came to trial before the Honorable James M. Carter, United States District Judge, and at the conclusion of the trial the Court found appellant guilty as charged [Tr. pp. 9, 10].

The Judgment and Commitment showing the finding of guilty was filed on December 13, 1954 [Tr. pp. 13, 14]. Notice of Appeal by appellant was filed on December 20, 1954 [Tr. pp. 15, 16].

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[1]"Tr." refers to Transcript of Record.

Jurisdiction in the United States District Court wa conferred by Section 3231, Title 18, United States Code Jurisdiction in this Court is conferred by Sections 129 and 1294, Title 28, United States Code.

II.

Statement of the Case.

The Indictment returned on October 13, 1954, charge that the appellant was duly registered with Local Boar No. 140; that he was thereafter classified in Class I-A and was notified of such classification; that a notice an order to appellant to report for induction on June 9, 195 was given appellant; and that on June 9, 1954 in Lo Angeles County, California, appellant did knowingly fai and refuse to be inducted into the Armed Forces of th United States [Tr. pp. 3, 4].

On November 1, 1954, appellant appeared before th Honorable James M. Carter, United States District Judge He was arraigned and entered a plea of not guilty. A jury waiver was executed by the appellant, was approve by the Court and was filed with the Court. The case wa set for trial for November 23, 1954 [Tr. pp. 5-6].

On November 23, 1954, trial was held before the Hon orable James M. Carter, without a jury, at the conclusio of which appellant was found guilty [Tr. pp. 9, 10]. O November 29, 1954, appellant filed a Motion for Judgmen of Acquittal or in the Alternative for a New Trial. O December 13, 1954, this Motion was heard by the Honor able James M. Carter and was denied [Tr. pp. 11, 12].

On December 13, 1954, sentence was pronounced an appellant was sentenced to two years imprisonment [Tr pp. 12-14]. On the same date appellant moved to b

admitted to bail pending determination of the Appeal. It was ordered that the hearing on this Motion should be continued until December 27, 1954 [Tr. pp. 14-15].

Notice of Appeal from the Conviction was filed by appellant on December 20, 1954 [Tr. pp. 15, 16]. On December 27, 1954, appellant was admitted to bail in the amount of $1000.00 pending determination of the Appeal of this case [Tr. p. 16].

On January 24, 1955, appellant filed his Statement of Points on Appeal [Tr. p. 17].

III.
Statute Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

IV.

Statement of the Facts.

On August 30, 1948, the appellant registered under the Selective Service System and was assigned to Local Board No. 140, San Diego County [Ex. pp. 1, 2].[2] On July 11, 1950, registrant was classified by the Local Board in Class I-A, and on July 14, 1950, he was mailed an SSS Form 110, notifying him of that classification [Ex. p. 12]. The Local Board shortly thereafter received a letter from registrant appealing his classification and stating that he was presently studying for the ministry at Pasadena College [Ex. p. 16]. In a letter dated September 8, 1950, Pasadena College verified the fact that the registrant was attending that institution as a full time student [Ex. p. 17]. Shortly thereafter the Local Board received a second letter from Pasadena College stating that the registrant was preparing for the ministry at that institution [Ex. p. 19]. The Board on October 27, 1950, placed registrant in Class IV-D and on November 2, 1950 mailed to registrant SSS Form 110 notifying him of his classification [Ex. p. 12].

On February 17, 1953, the Local Board received notice from Long Beach State College that the registrant was enrolled at that institution as a special student and was pursuing only twelve units of instruction [Ex. pp. 26,

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[2]Exhibit I is a photostatic copy of the contents of the appellant-registrant's Selective Service file. The photostats which constitute Exhibit I are numbered consecutively and these numbers are circled. References in Appellee's Brief refer to the photostat number and not to page numbers.

7]. In a letter dated February 18, 1953, the Local Board notified the registrant that they would need additional information from him if he was to continue in Class IV-D [Ex. p. 28]. In a letter also dated February 18, 1953, the registrant claimed for the first time to be conscientiously opposed to war [Ex. pp. 29, 30]. This letter is set forth in its entirety in Appendix A of this brief. On February 24, 1953, the Local Board received another letter from the registrant which was evidently written in answer to the Local Board's letter of February 18, 1953, and which set forth the registrant's reasons for conscientious objection and for his transferring from Pasadena College to Long Beach State College [Ex. pp. 33-36]. This letter constitutes Appendix B of this brief.

On March 3, 1953, registrant filed with the Local Board a Special Form for Conscientious Objector in which he claimed to be opposed to participation in both combatant and non-combatant training and service in the Armed Forces. One Dorothy Andrus assisted registrant in preparing this questionnaire and this form was filled out almost in its entirety in the hand of Dorothy Andrus [Ex. pp. 38-43].

On March 4, 1953, registrant was classified I-A by the Local Board which mailed SSS Form 110 to the registrant on March 5, 1953. In a letter dated March 9, 1953, registrant requested a personal appearance before the Local Board and appealed his classification of I-A [Ex. p. 46]. On March 19, 1953, registrant appeared personally before the Local Board. The Selective Service file con-

tains a memorandum summarizing what occurred during this personal appearance. The Board members agreed to classify the registrant in Class I-O [Ex. p. 55]. In a letter dated March 19, 1953 directed to the Local Board the registrant further explained his viewpoint relative to conscientious objection [Ex. pp. 51-53]. The contents of this letter is set forth in Appendix C of this brief. The registrant was reclassified and placed in Class I-O on March 19, 1953. On the day following, registrant was notified of this classification [Ex. p. 12].

In a letter dated April 23, 1953 to the Local Board R. R. Sanders, Capt. U.S.A.F., Coordinator, District Headquarters No. 6, advised the Local Board concerning certain facts which had come to his attention concerning the Internatonal Christian Revival Association in which association the registrant claimed membership. Captain Saunders stated that in his opinion the facts set forth in his letter demonstrate that registrant was not entitled to a classification of I-O [Ex. p. 60]. On May 7, 1953, the registrant was reclassified I-A and the next day notice of his classification was mailed to him. In a letter dated May 13, 1953, the registrant appealed the I-A classification and requested a personal appearance. He enclosed in the letter the "articles of belief" of the organization to which he belonged [Ex. pp. 65-67]. On May 21, 1953 the registrant personally appeared before the Local Board. The Local Board voted to continue the registrant in Class I-A. A copy of the memorandum summarizing what occurred at this personal appearance is contained in the

Selective Service file [Ex. p. 71]. On May 21, 1953, registrant was notified that he had been continued in Class I-A [Ex. p. 12].

On June 18, 1953, the Local Board forwarded the Selective Service file concerning the registrant to the Appeal Board [Ex. pp. 12, 72]. The file was thereafter sent to the United States Attorney for the purpose of securing an advisory recommendation from the Department of Justice [Ex. p. 73]. After the registrant had appeared before the Hearing Officer, that officer recommended that the registrant's claim be not sustained. The Special Assistant to the Attorney General concurred in this recommendation and by letter dated March 26, 1954 notified the Appeal Board to this effect. A résumé of the investigative report of the F.B.I. was attached to and made a part of that letter [Ex. pp. 75-80]. On April 15, 1954, the Appeal Board placed registrant in Class I-A [Ex. p. 81]. On April 19, 1954, the Local Board received back the Selective Service file of the registrant from the Appeal Board and on that same date notified the registrant of his classification [Ex. p. 12].

On May 4, 1954, registrant was ordered to report for induction on May 19, 1954 [Ex. 83]. Thereafter registrant requested to be transferred for delivery to Local Board No. 135 located in Orange County [Ex. p. 84]. On June 1, 1954, Local Board No. 135 ordered registrant to report for induction on June 9, 1954 [Ex. p. 33]. On June 9, 1954, registrant reported for induction as ordered and refused to submit to induction [Ex. p. 86].

V.

ARGUMENT.

A. The Local Board's Act of Placing the Registrant in Class I-A on May 7, 1953 Was Reasonable and the Classification Was Based Upon Fact.

The decisions of the Local Board, made in conformity with the regulations, are final even though erroneous and questions previously decided by the Local Board will not be reviewed by the Courts so long as there was some basis in fact for the Local Board's decision. (*Estep v. United States* (1946), 327 U. S. 114, 122.)

On February 18, 1953 the registrant wrote a letter to the Local Board in which he stated that he was conscientiously opposed to war. This letter is reproduced in Appendix A of this brief. It was written by the registrant at the age of twenty-three, approximately four and one-half years after he had first registered with the Selective Service System, and it was the first time that the registrant had made this claim to the Local Board. It is probable that at that time the registrant's determination not to serve was of recent origin for the letter states, "I have always felt that I could not take another man's life, but now I feel that I can have no place in the war effort." (*Bradley v. United States* (C. C. A. 9, 1954), 218 F. 2d 657.) (Recent Conversion.) The registrant then wrote another missive in which he explained his reasons for leaving ministry school and stated, "I ask no favours. I only want you to know that I can have no part in this war effort. What you do with me from this point on is up to you. I know that if I want to see 'peace on earth and good will toward men' it will not come through war, but through the Gospel of Jesus

Christ my Lord. You may ask the question what then will we do with the Russians or Communists? I would answer that war has never done anything to stop them and if it did it would only be till they could regain their looting." This letter is contained in Appendix B. The registrant thus speaks of the futility of war—of its deficiency as a tool towards gaining "peace on earth" and of the danger of not achieving permanent victory at arms. These are practical thoughts. But they are not ideas born of religious training and belief.

Appendix C contains a third letter written by the registrant and reviewed by the Local Board before determining the merits of his claim. This letter expands upon the registrant's non-religious and religious objections and in effect reaffirms General Sherman's words. But the religious characteristics of this expousal do not predominate. The registrant also filed with the Local Board an SSS Form 150 in which he stated that he was opposed to war in any form, both combatant and noncombatant [Ex. pp. 38-43]. In answering question number three of this form concerning the source of his beliefs, the registrant again indicated that his objection was new, for he said, "I received this belief from the Bible. In the last few months I have come to the conclusion that this belief is in line with the word of God. . . ." [Ex. p. 39].

It is clear, therefore, that the record as it stood prior to March 19, 1953 would have furnished ample justification for the Local Board to classify the registrant I-A on that date. They didn't. They placed him in Class I-O.

On April 24, 1953 the Local Board received a letter from one R. R. Sanders, Captain, USAF, in which Cap-

tain Sanders stated, concerning the International Christia Revival Association,

> "The investigation revealed that this organizatio has, at present only some 20 members, and that the are supervised by Mr. George E. Andrus, 5742 E Thelma Avenue, Buena Park, California. Mr Andrus was contacted this date, and stated tha he was ordained in 1946. He advised that subjec religious organization was incorporated in 1951 and verified a statement made by the Santa An registrant that the group decided, on 18 Novembe 1952, that they were conscientiously opposed to wa and, on that date, passed a resolution to that effect. [Ex. p. 60.]

Two weeks later the Local Board reclassified the regis trant I-A. Appellant contends that he was reclassifie I-A solely as a result of this letter and further:

> "The record is devoid of any evidence, other tha this letter from Captain Sanders, upon which th Board could have acted." (Br. of App. p. 8.)

This contention is pure speculation and sophistry. It i speculative to state that the Local Board acted for on reason when the record furnishes many additional reason for this action. It is sophistic to argue that the recor is devoid of evidence excepting this letter upon which th Local Board could have acted. The record is replete wit such evidence. Appellant's argument is evidently base upon the fact that no evidence intervened between the dat when the Local Board received the letter from Captai Sanders and the date upon which the registrant wa reclassified I-A. The argument assumes that the Loca Board was foreclosed from reconsidering evidence cor tained in the Selective Service file after it had once bee considered. Such an assumption in untenable. The Loca

Board is duty bound to re-examine all the evidence in the course of determining whether or not to reclassify a registrant.

It is however a fair inference from the evidence that the letter from Captain Sanders resulted in the attentions of the Local Board being again directed to this particular registrant in the light of the new asserted facts contained in that letter. The letter concerned itself with the organization to which the registrant claimed membership. The nature and beliefs of the institution are highly important in determining the proper classification of the individual. The conscientious objection which is recognized by the Law as constituting a proper basis for exemption is one which is based upon religious training and belief. Therefore the vital questions which the Local Board must concern itself with when inquiring into each individual's claim are—From whence the religious training?—From whence the belief? The Local Board is vested with the responsibility of determining whether the individual's belief is so deep seated as to be conscientious. (*White v. United States* (C. C. A. 9, 1954), 215 F. 2d 782.) A necessary inquiry therefore, although never determinative in and of itself, is how long-standing, how encompassing, and how permanent are the beliefs of the organization to which the individual belongs. This thesis in no way alters or mitigates against the fact that it is the individual's beliefs which are the primary concern of the Selective Service System when passing upon the individual's claim.

The letter from Captain Sanders brought to the attention of the Local Board the asserted fact that prior to November 18, 1952 beliefs of the International Christian Revival Association did not include opposition to war,

but on that date the group *passed a resolution* conscientiously opposing war. Resolutions which are passed by an organization (perhaps by majority vote) can be rescinded by the organization. What then of the registrant's beliefs? Under these circumstances it was incumbent upon the Local Board to reexamine the claim of the registrant and in doing so to review the entire file. This review would necessarily include the registrant's letters (Appendices A, B and C) and his viewpoints which are therein evidenced and have been discussed previously. The letter of February 18, 1953 (App. A) contains the words, "I don't believe there is a church today which is standing for the teachings of Jesus Christ, or living as the first Christian church did." The registrant then states, "I'm in just a small group of people, and we are trusting Christ and His Word that He will give us a revival for our day." Reading these two expressions together it appears very unlikely that the registrant considered the International Christian Revival Association a church. In the letter of March 19, 1953 (App. C) the registrant stated,

> "The church people of our day do not believe what Christ taught, for if they did they too would stand for Him and see our war-torn world brought to Him. When I say the church people today don't believe what Christ taught, I mean just that. . . . But this hardly ever happens, for as soon as they start following God the preachers of today lead them into darkness . . ."

The disillusionment and confusion shown by these letters taken together with the other facts shown by the registrant's file undoubtedly convinced the Local Board that the registrant's objections were not primarily religious nor were they so deep seated as to entitle him to the exemp-

tion. The Board may have noticed that compared to the SSS Form 150 (Special Form for Conscientious Objector) the earlier expressions by the registrant of the reasons for his claim contained in his letters were fairly inarticulate. As mentioned earlier the SSS Form 150 was written in the hand of one Dorothy Andrus who resides at the same address as Mr. George E. Andrus, the head of the International Christian Revival Association. The Local Board may have doubted that the convictions and the scriptures quoted in support thereof expressed in the SSS Form 150 were in fact the convictions of the registrant.

Captain Sanders closed his letter to the Local Board by expressing his opinion that the I-O classification was unwarranted. The record does not disclose the exact role of Captain Sanders in the Selective Service organization. His unsolicited opinion was certainly not binding upon the Local Board and even had the Board members paid undue attention to that opinion the case at hand would in no way resemble the situation presented in *Hinkle v. United States* (C. C. A. 9, 1954), 216 F. 2d 3; *Goetz v. United States* (C. C. A. 9, 1954), 216 F. 2d 270; and *Shepherd v. United States* (C. C. A. 9, 1954), 217 F. 2d 942. In those cases and others the Department of Justice recommended against sustaining the claim of the registrant and this recommendation was based upon an erroneous interpretation of the Law. The Law expressly provides that there shall be a recommendation from the Department of Justice as an aid to the Appeal and Local Boards, and it is intended that these Boards shall pay heed to and to some extent shall be influenced by the Department's recommendation. It would be surprising if Captain Sander's opinion were to be given the same dignity.

B. The Classification by the Appeal Board on April 15, 1954 Had Basis in Fact.

Inasmuch as it is the duty of the Appeal Board upon appeal to classify the registrant *de novo* any error which was committed by the Local Board can be disregarded by this Court. Such error will not have prejudiced substantial rights of the registrant. (*Tomilson v. United States* (C. C. A. 9, 1954), 216 F. 2d 12, 16; *Goetz v. United States, supra,* 272; *Hinkle v. United States, supra,* 9 (n. 3); and others.) This rule was held inapplicable to the particular facts of *Franks v. United States* (C. C. A. 9, 1954), 215 F. 2d 266 because the error of the Local Board related to the personal appearance of the registrant, but that is not the situation in the case at hand.

The résumé of the investigative report [Ex. pp. 78-80] discloses that among those interviewed there was complete divergence of opinion as to whether the registrant was sincere in his beliefs; that a leader of the International Christian Revival Association expressed the opinion that the registrant "was not worthy" of a conscientious objector classification; that in August 1953 the registrant was dropped from the rolls of that organization; that at the time of the investigation the registrant had returned to the Church of the Nazarene; and that a former employer stated that the registrant was "unstable in his thinking" regarding religious matters.

After the registrant had personally appeared before the Hearing Officer, that officer reported in part as follows:

> "The Hearing Officer reported that the registrant stated that he was opposed to participation in war in any form. The registrant advised the Hearing Officer, however, that he believed that it was proper

for governments to carry on wars and that people should be in the Army. He stated that he believed that it is satisfactory for those who choose to protect themselves through the use of force. He does not believe that he should participate in war. The registrant stated that he did not expect to be exempt because of his activities in the International Christian Revival Association, and would not expect to be exempt from active participation in war based upon the teachings of the Association, but that he would do violence to no man, and that if his family were attacked he would do nothing. He stated that he had not participated in any outward activities of a church nature. He stated that he had just been straightened out and that he had now found the simplicity of "walking with Christ as a Christian man."

The Hearing Officer and the Department of Justice recommended that the registrant's claim be not sustained.

It is thus apparent that there was ample evidence before the Appeal Board to justify a classification of I-A.

C. Both the Local Board and Appeal Board Considered the Registrant's Qualifications for Class I-A-O Before They Classified Him I-A.

Registrant was given consideration to determine whether he qualified for Class I-A-O. In *Koch v. United States* (C. C. A. 4), 150 F. 2d 762, it is stated at page 763:

> "A presumption of regularity attaches to official proceedings and acts; it is a well settled rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and where the contrary is asserted it must be affirmatively shown."

At the time of trial of this case the appellant offered no evidence to refute this presumption of regularity and he may not now request this Court to speculate that the procedures of the Local and Appeal Boards were incorrect.

VI.

Conclusion.

Judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

RICHARD L. SULLIVAN,
Assistant U. S. Attorney.

Attorneys for Appellee.

APPENDIX A.

Local Board No. 140 4-140-29-496
San Diego County 2-18-53
Feb. 20, 1953 29-496
Room 222, 525 E Street
San Diego, California

Dear Sirs:

Because of my religious belief I find it my responibility to notify you in that I am a conscientious objector. I have always felt that I could not take another mans life, but now I feel that I can have no place in the war effort.

I have studied the Bible and find that Jesus Christ taught that there is only one way to over come evil and that is with good. The world would have long ago been Christian if the church had ~~of~~ followed Christ's teachings. But they failed when they started to fight their way out in 313 A.D.. I don't believe there is a church today which is standing for the teachings of Jesus Christ, or living as the first Christian church did.

I'm in just a small group of people, and we are trusting Christ and His Word that He will give us a revival for our day. There is no other hope in the world, for the people's standard of morals must rise before the Nation will.

In closing I would like to request a form to fill out for being a Conscientious objector. And I would like to leave you my present address:

Joe Ayers
3136 Anaheim
Long Beach, Calif.

APPENDIX B.

4-140-29-496
Local Board No. 140
San Diego County
Feb. 24, 1953
Room 222, 525 E. Street
San Diego, California

Dear Sirs,

I received your letter and hope that you have received the letter which I sent to you.

Last semester I was attending Pasadena College, which is a theological school. Truth and the Bible were overlooked and I had to speak up against the sin which went on in the campus. The President of the college did not care for my protest. Nor did some of the professors. I then felt it best that I remove myself from the theological school. Then realizing that there are no church schools which are teaching the Bible in the true since, and wanting to finish my college work I inrolled at Long Beach State College. My transcript containing a few low grades which I received when in my lower part of college, I was placed as a special in Long Beach State College (carring only 12 units). I was converted in my last year of ~~college~~ high school, and also called to preach. Before this time (all through school) I had done very little school work, this now shows up in my studying in College. My grades have come up to a "C" average.

I do appreciate all that you have done for me in the past. I now stand at your mercy. I ask no favours. I only want you to know that I can have no part in this war effort. What you do with me from this point on is

up to you. I know that if I want to see "peace on earth and good will toward men" it will not come through war, but through the Gospel of Jesus Christ my Lord. You may ask the question what then will we do with the Russians or Communists? I would answer that war has never done anything to stop them and if it did it would only be till they could regain their footing.

I know not if you are God fearing men or not. But if the God in whom I believe in is able to create man He is also able to stop any Russian or Communist. For the God I know holds men's breath in His hand, that is He allowes you and I to live.

I do not claim to be a pacifist. I will fight that which is wrong with all my might, but I will choose my own weapons, that being of love and of strong rebuke, backed by the Almighty Hand of God.

I find it impossible to kill man and remain Christian. I do not care who else might think so or claim to do so. The Word of God plainly tells us "Thou Shalt Not Kill."

JOE AYERS
3136 Anaheim St.
Long Beach, Calif.

APPENDIX C.

4-140-29-496
3-19-53

Dear Sirs:

I was asked to write to the Board (#140) and give information on the beliefs I have concerning war.

I would like to say first that I don't believe war has ever brought lasting peace. And I don't believe it will ever do so. But I do believe that the world can have peace. That is to say I believe that there is a stronger power than physical force. I believe that if the people today had any backbone and would believe and stand upon the principles which Jesus Christ gave we would see World peace. But as long as one man holds a gun or sword over the other there will be war.

After the time of Jesus Christ, His Apostles took their know world. Not with guns or swords but with hearts filled with love for mankind. The church people of our day do not believe what Christ taught, for if they did they too would stand for Him and see our war-torn world brought to Him. When I say the church people today don't believe what Christ taught, I mean just that. Yet I do realize that there are people doing the best they can today. If they continue in the light which God gives, they will also trust God for world peace and have victory in their own hearts & lives in all their problems. But this hardly ever happens, for as soon as they start following God the preachers of today lead them into darkness, even as Christ told us they would, when he said, "the blind shall lead the blind and both shall fall into the ditch."

I do not feel I can take any part in the Armed Services. feel if I were to even go in as a Chaplin or a Medical elper I would be taking part in that which I am standing gainst, and how can a house stand which is divided. must be true to God first.

I will stand and fight for this our America or the orld, but I refuse to use the means which the world using to gain peace. Jesus Christ said, "they that take e sword shall perish by the sword." This is true of the ountry as well as of the individual. If you fight and even in one time, the enemy will return half slain and slay ou. So the only way to have peace is to do as Christ ught when he said, ". . . over come evil with good."

JOE AYERS

No. 14647

United States
Court of Appeals
for the Ninth Circuit

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Southern District of California
Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

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Appellee.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Southern District of California
Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

H. BRIAN HOLLAND,
Asst. Attny. General;

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney, Chief, Tax Division,
623 Federal Building,
Los Angeles 12, California.

ELLIS N. SLACK,
Sp. Asst. to the Attorney General, Dept. of Justice,
Washington, D. C.

For Appellee:

BINFORD & BINFORD,
1208 Hollingsworth Bldg.,
Los Angeles, California.

JAMES A. CASTER,
714 W. Olympic Blvd.,
Los Angeles, California.

District Court of the United States for the Central Division of the Southern District of California

Civil Action No. 11879-PH

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California; JOHN DOE and RICHARD ROE,

Defendants.

COMPLAINT
(Refund of Taxes)

For its cause of action against the above-named defendants the above-named plaintiff alleges:

1. That jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

2. That the Plaintiff, Stockholders Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada and has met all qualifications as a foreign corporation to transact business in the State of California. That its principal place of business is in the City of Los Angeles, Los Angeles County, State of California.

3. That Defendant, Harry C. Westover, was at all times mentioned herein, the Collector of Internal Revenue for the sixth collection district of Cali-

fornia; that the payments herein sought to be recovered were made to him while he occupied the position of Collector of Internal Revenue and were so paid to him as the collector of internal revenue.

4. That the true names of the defendants, John Doe and Richard Roe, are unknown [2*] to the plaintiff at this time, and it is requested that plaintiff be permitted to amend the complaint and insert, their true names in the place of such fictitious names when the true names become known to the plaintiff.

5. That on the 15th day of December, 1948, taxes and interest in the amount of $8,068.51 were paid to the defendant for the taxable year ending on December 31, 1943, and on the 15th day of December, 1948, taxes and interest in the amount of $8,944.53 were paid to the defendant for the taxable year ending on December 31, 1944, or a total of $17,013.04, pursuant to defendant's demand.

6. That claims for refund were filed with the defendant on April 21, 1949, for the amount of $17,013.04 on the ground that the said amount had been illegally collected by said Harry C. Westover as Collector of Internal Revenue in that the route district men and dealers in newspapers published by plaintiff were not employees of plaintiff as contended by defendant but were independent contractors. That attached hereto and marked Exhibits A and B, respectively, and hereby made a part of this complaint, are true copies of the said claims for refund.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

7. That the claims for refund have not been allowed or paid but have been disallowed. That a copy of a letter informing taxpayer of the disallowance of its claims is attached hereto and marked Exhibit C and hereby made a part of this complaint.

8. The facts upon which plaintiff's claim are based are:

(a) In the years 1943 and 1944 plaintiff was in the business of publishing a daily newspaper, the Daily News, at Los Angeles, California.

(b) That the said plaintiff, as publisher and distributor of the said Daily News, sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by the said route district men and dealers. That the said route district men and dealers resold, or offered for resale, the newspapers so purchased retaining any excess over their cost, as their profits in the transaction.

(c) That the Commissioner of Internal Revenue, erroneously found and determined that the said route district men and dealers were employees of the plaintiff and not independent contractors. That the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such [3] newspapers by the route district men and the dealers, over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error the amount of $7,558.52 was assessed by him

against the plaintiff for the year 1943 with interest thereon in the sum of $509.99, or a total of $8,068.51. That as a result of the Commissioner's error the amount of $8,379.17 was assessed by him against the plaintiff for the year of 1944 with interest thereon in the sum of $565.36 or a total of $8,944.53. That the aggregate of said amounts so paid on assessments for said two years was $17,013.04 which amount was duly paid by plaintiff on the 15th day of December, 1948, to and upon the demand of the defendant, Harry C. Westover, as Collector of Internal Revenue.

9. That the said route district men and dealers were not employees of the plaintiff but per contra are independent contractors and as independent contractors the profits earned by them from the resale of newspapers as aforesaid are non-taxable under the Federal Unemployment Tax Act.

10. That the assessments and collection of the above-mentioned taxes and interest were erroneous and illegal, and the plaintiff was and is entitled to have a refund from said defendant of said sum of $17,013.04 with interest thereon from December 15, 1948.

11. That plaintiff's claims for refund have not been satisfied either in whole or in part, and the total amount, namely, $17,013.04, is now due and owing from the defendant.

Wherefore, plaintiff prays:

1. For Judgment against defendant in the sum

of $17,013.04 with interest thereon as aforesaid together with its costs;

2. For such other relief as the Court may deem just and proper.

BINFORD AND BINFORD.

By /s/ L. B. BINFORD,

/s/ JAMES A. CASTER,

Attorneys for Plaintiff.

Duly verified. [4]

EXHIBIT A

Claim

Form 843
Treasury Department,
Internal Revenue Service.

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector Will Indicate in the Block Below the Kind of Claim Filed, and Fill in the Certificate on the Reverse.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp (Date received): [Blank.]

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Stockholders Publishing Company, Inc.

Business address: 1257 So. Los Angeles St., Los Angeles 15, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: 6th District, Los Angeles, California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1943, to Dec. 31, 1943.
3. Character of assessment or tax: Excise Tax on Employer Under Federal Unemployment Tax Act.
4. Amount of assessment: $8,068.51.
   Dates of payment: December 15, 1948.
5. Date stamps were purchased from the Government: .....
6. Amount to be refunded: $8,068.51.
7. Amount to be abated (not applicable to income, gift, or estate taxes): .....
8. The time within which this claim may be legally filed expires, under section 3313 of Internal Revenue Code, on December 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors.

/s/ J. J. PADULO,
Treasurer, Stockholders Publishing Company, Inc.

Subscribed and sworn to before me this 21st day of April, 1949.

[Seal] /s/ AZILEE DURHAM,
Notary.

My commission expires Feb. 27, 1953. [5]

EXHIBIT B

Claim

Form 843,
Treasury Department,
Internal Revenue Service.
(Revised July, 1947.)

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector Will Indicate in the Block Below the Kind of Claim Filed, and Fill in the Certificate on the Reverse.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp (Date received) [Blank.]

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Stockholders Publishing Company, Inc.

Business address: 1257 So. Los Angeles St., Los Angeles 15, California.

Residence: .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: 6th District, Los Angeles, California.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1944, to Dec. 31, 1944.
3. Character of assessment or tax: Excise Tax on Employer Under Federal Unemployment Tax Act.
4. Amount of assessment: $8,944.53.
   Dates of payment: December 15, 1948.
5. Date stamps were purchased from the Government: .....
6. Amount to be refunded: $8,944.53.
7. Amount to be abated (not applicable to income, gift, or estate taxes): .....
8. The time within which this claim may be legally filed expires, under section 3313 of Internal Revenue Code, on December 15, 1952.

The deponent verily believes that this claim should be allowed for the following reasons:

> The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by the taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors.

/s/ J. J. PADULO,
Treasurer, Stockholders Publishing Company, Inc.

Subscribed and sworn to before me this 21st day of April, 1949.

/s/ AZILEE DURHAM,
Notary.

My commission expires Feb. 27, 1953. [8]

EXHIBIT C

(Copy)

U. S. Treasury Department, Washington 25

Oct. 20, 1949.

Office of: Commissioner of Internal Revenue.

Address Reply to: Commissioner of Internal Revenue and Refer to:

EmT:A:AA:4-THS,
Cls-876901 and 876902.
Stockholders Publishing Co., Inc.,
1257 South Los Angeles Street,
Los Angeles 15, California.

Sirs:

Reference is made to your claims in the respective amounts of $8,068.51 and $8,944.53 for refund of excise tax and interest paid for the years 1943 and 1944 under the Federal Unemployment Tax Act. The basis of your claims is given as follows:

> "The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by the taxpayer.
>
> "Under the law (Public Law 642, 80th Congress enacted June 14, 1948, which has the same

effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

"By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors."

The records of this office disclose that in Bureau letter, dated October 16, 1947, as subsequently modified, it was held that certain individuals performing services for you as route district men and dealers for distribution of newspapers published by you were your employees for Federal Employment Tax purposes. Such ruling was made on the basis of the provisions of Section 402.204 of Regulations 106 relating to the Federal Insurance Contributions Act and Section 403.204 of Regulations 107 relating to the Federal Unemployment Tax Act which are in conformity with the provisions of Public Law No. 642.

No additional information has been presented to this office which would warrant a further modification of or a revocation of the ruling dated October 16, 1947, as modified.

Your claims for refund are disallowed. This notice of disallowance is sent by registered mail in

accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code.

By direction of the Commissioner.

Respectfully,

/s/ VICTOR H. SELF,
Deputy Commissioner.

THS:BJL.

[Endorsed]: Filed July 7, 1950. [10]

[Title of District Court and Cause.]

No. 11879-PH

ANSWER

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraph 1.

II.

Admits the allegations contained in Paragraph 2.

III.

Admits the allegations contained in Paragraph 3.

IV.

Denies the allegations contained in Paragraph 4.

V.

Admits the allegations contained in [11] Paragraph 5.

VI.

Paragraph 6 is denied, except it is admitted that on April 21, 1949, plaintiff filed claims for refund in the amount of $17,013.04, and that Exhibits A and B to the complaint are copies of said claims for refund. The defendant alleges that the claims for refund speak for themselves with respect to their contents and denies the averments contained in said refund claims to the extent that the averments in said claims are not otherwise specifically admitted in this answer.

VII.

Admits the allegations contained in Paragraph 7.

VIII.

Admits the allegations contained in Paragraph 8(a).

IX.

The defendant is without knowledge or information sufficient to form a belief as to the truth of Paragraph 8(b).

X.

Paragraph 8(c) is denied, except it is admitted that the Commissioner determined that the route district men and the dealers were employees of plaintiff and that their earnings were taxable under the Federal Unemployment Tax Act.

XI.

Paragraph 8(d) is admitted, except it is denied that there was any error on the part of the Commissioner, and it is alleged that the payments were made on December 21, 1948, and January 3, 1949.

XII.

Denies the allegations contained in Paragraph 9.

XIII.

Denies the allegations contained in Paragraph 10.

XIV.

Paragraph 11 is denied, except it is admitted that plaintiff's claims for refund have not been satisfied. [12]

Wherefore, having fully answered, defendant prays that it be hence dismissed with its costs in this behalf expended.

ERNEST A. TOLIN,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants United States Attorney;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue;

/s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 11, 1950. [13]

District Court of the United States for the Central Division of the Southern District of California

Civil Action No. 14627

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California; JOHN DOE, and RICHARD ROE,

Defendants.

COMPLAINT
(Refund of Taxes)

For its cause of action against the above-named defendants the above-named plaintiff alleges:

1. That jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

2. That the Plaintiff, Stockholders Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada and has met all qualifications as a foreign corporation to transact business in the State of California. That its principal place of business is in the City of Los Angeles, Los Angeles County, State of California.

3. That Defendant, Robert A. Riddell, was at all times mentioned herein, the Collector of Internal Revenue for the sixth collection district of Cali-

fornia; that the payments herein sought to be recovered were made to him while he occupied the position of Collector of Internal Revenue and were so paid to him as the Collector of Internal Revenue.

4. That the true names of the defendants, John Doe and Richard Roe, are [15] unknown to the plaintiff at this time, and it is requested that plaintiff be permitted to amend the complaint and insert their true names in the place of such fictitious names when the true names become known to the plaintiff.

5. That on the 12th day of July, 1950, taxes and interest in the amount of $8,796.64 were paid to the defendant for the taxable year ending on December 31, 1945, pursuant to defendant's demand.

6. That a claim for refund was filed with the defendant on July 31, 1950, for the amount of the said taxes or for the amount of $8,671.51 on the ground that the said amount had been illegally collected by the said Robert A. Riddell as Collector of Internal Revenue in that the route district men and dealers in newspapers published by plaintiff were not employees of plaintiff as contended by defendant but were independent contractors. That attached hereto, marked Exhibit A and hereby made a part of this complaint, is a true copy of the said claim for refund.

7. That the claim for refund has not been allowed or paid but has been disallowed. That a copy of a letter informing taxpayer of the disallowance

of its claim is attached hereto and marked Exhibit B and hereby made a part of this complaint.

8. The facts upon which plaintiff's claim is based are:

(a) In the year 1945 plaintiff was in the business of publishing a daily newspaper, the Daily News, at Los Angeles, California.

(b) That the said plaintiff, as publisher and distributor of the said Daily News, sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by the said route district men and dealers. That the said route district men and dealers resold, or offered for resale, the newspapers so purchased retaining any excess over their cost, as their profits in the transaction.

(c) That the Commissioner of Internal Revenue, erroneously found and determined that the said route district men and dealers were employees of the plaintiff and not independent contractors. That the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers, over the wholesale price paid [16] to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error the amount of $8,671.51 was assessed by him against the plaintiff for the year 1945 with interest thereon in the sum of $125.13 or a total of $8,796.64. That the aggregate of said amounts on assessment was

duly paid by plaintiff on the 12th day of July, 1950, to and upon the demand of the defendant, Robert A. Riddell as Collector of Internal Revenue.

9. That the said route district men and dealers were not employees of the plaintiff but per contra are independent contractors and as independent contractors the profits earned by them from the resale of newspapers as aforesaid are non-taxable under the Federal Unemployment Tax Act.

10. That the assessments and collection of the above-mentioned taxes and interest were erroneous and illegal, and the plaintiff was and is entitled to have a refund from said defendant of said sum of $8,796.64 with interest thereon from July 12, 1950.

11. That plaintiff's claim for refund has not been satisfied either in whole or in part, and the total amount, namely, $8,796.64, is now due and owing from the defendant.

Wherefore, plaintiff prays:

1. For Judgment against defendant in the sum of $8,796.64 with interest thereon as aforesaid together with its costs;

2. For such other relief as the Court may deem just and proper.

BINFORD AND BINFORD,

By /s/ L. B. BINFORD,

/s/ JAMES A. CASTER,

Attorneys for Plaintiff.

Duly verified. **[17]**

EXHIBIT A

Claim

Form 843,
U. S. Treasury Department,
Internal Revenue Service.

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector Will Indicate in the Block Below the Kind of Claim Filed, and Fill in, Where Required, the Certificate on the Back of This Form.

☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp (Date received): [Blank.]

Name of taxpayer or purchaser of stamps: Stockholders Publishing Company, Inc.

Street address: 1257 So. Los Angeles St., Los Angeles 15, California.

City, postal zone number, and State:.....

1. District in which return (if any) was filed: 6th District, Los Angeles, Calif.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1945, to Dec. 31, 1945.

3. Kind of tax: Excise Tax on Employer Under Federal Unemployment Tax Act.

4. Amount of assessment: $8,671.51.
Dates of payment: July 12, 1950.

5. Date stamps were purchased from the Government: .....

6. Amount to be refunded: $8,671.51.

7. Amount to be abated (not applicable to income, estate, or gift taxes): .....

The claimant believes that this claim should be allowed for the following reasons:

The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.

Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.

By applying the common law rules, it is the taxpayer's contention that the route district

men and the dealers are independent contractors.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ J. J. PADULO,
Treasurer, Stockholders Publishing Company, Inc.

Dated July 31, 1950. [19]

EXHIBIT B

(Copy)

U. S. Treasury Department, Washington 25

October 27, 1950.

Office of: Commissioner of Internal Revenue.
Address reply to: Commissioner of Internal Revenue and refer to:
EmT:A:AA:4-THS,
Cl-890790.

Stockholders Publishing Co., Inc.,
1257 South Los Angeles Street,
Los Angeles 15, California.

Sirs:

Reference is made to your claim on Form 843 in the amount of $8,671.51 for refund of excise tax

and interest paid for the year 1945 under the Federal Unemployment Tax Act. The basis of your claim is given as follows:

> "The tax assessed was made to cover compensation payments to route district men and dealers for distribution of newspapers published by the taxpayer, on the contention that the said route district men and dealers were employees for Federal Unemployment Tax purposes and not independent contractors as contended by taxpayer.
>
> "Under the law (Public Law 642, 80th Congress, enacted June 14, 1948, which has the same effect as if included in the Internal Revenue Code on February 10, 1939), the question of whether or not an individual is an independent contractor or an employee for purposes of assessing the Federal Unemployment Tax, must be determined by the common law rules applicable in determining the employer-employee relationship.
>
> "By applying the common law rules, it is the taxpayer's contention that the route district men and the dealers are independent contractors."

The records of this office disclose that in Bureau letter, dated October 16, 1947, as subsequently modified, it was held that certain individuals performing services for you as route district men and dealers for distribution of newspapers published by you

were your employees for Federal employment tax purposes. Such ruling was made on the basis of the provisions of Section 402.204 of Regulations 106 relating to the Federal Insurance Contributions Act and Section 403.204 of Regulations 107, relating to the Federal Unemployment Tax Act which are in conformity with the provisions of Public Law No. 642.

No additional information has been presented to this office which would warrant a further modification of or a revocation of the ruling dated October 16, 1947, as modified.

Your claim for refund is disallowed. This notice of disallowance is sent by registered mail in accordance with the provisions of Section 3772(a)(2) of the Internal Revenue Code.

By direction of the Commissioner:

Respectfully,

/s/ VICTOR H. SELF,
Deputy Commissioner.

THS:CRS.

[Endorsed]: Filed October 20, 1952. [21]

[Title of District Court and Cause.]

No. 14,627-HW

ANSWER

Comes Now the Defendant, Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, and in answer to the complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph 1.

II.

Admits the allegations contained in Paragraph 2.

III.

Admits the allegations contained in Paragraph 3.

IV.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4. [22]

V.

Admits the allegations contained in Paragraph 5, except it is alleged that payment was made on July 4, 1950.

VI.

Denies the allegations contained in Paragraph 6, except it is admitted and alleged that on August , 1950, plaintiff filed a claim for refund in the amount of $8,671.51 and that Exhibit A to the com-

plaint is a copy of said claim for refund. The de-
fendant alleges that the claim for refund speaks for
itself with respect to its contents, and denies the
averments contained in said claim for refund to the
extent that such averments are not otherwise spe-
cifically admitted in this answer.

VII.

Admits the allegations contained in paragraph 7

VIII.

(a) Admits the allegations contained in Para-
graph 8(a).

(b) The defendant is without knowledge or in-
formation sufficient to form a belief as to the truth
of the allegations contained in Paragraph 8(b).

(c) Denies the allegations contained in Para-
graph 8(c), except it is admitted that the Commis-
sioner of Internal Revenue determined that the dis-
trict route men and dealers were employees of plain-
tiff for purposes of the Federal Unemployment Tax
Act and that their earnings were taxable under
said Act.

(d) Denies the allegations contained in Para-
graph 8(d), except it is alleged that as a result of
the Commissioner's determination, additional taxes
were assessed against plaintiff for the year 1945
in the amount of $8,671.51, with interest thereon in
the sum of $124.13, or a total of $8,795.64. It is
further alleged that the aggregate amount of said
assessment was paid by plaintiff on the 14th day of
July, 1950, to and upon the demand of the defend-

ant, Robert A. Riddell, as Collector of Internal Revenue. [23]

IX.

Denies the allegations contained in Paragraph 9.

X.

Denies the allegations contained in Paragraph 10.

XI.

Denies the allegations contained in Paragraph 11, except it is admitted that plaintiff's claim for refund has not been satisfied.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

WALTER S. BINNS,
United States Attorney;

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistants U. S. Attorney;

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal Revenue;

By /s/ EUGENE HARPOLE,
Attorneys for Defendant Robert A. Riddell, Collector of Internal Revenue, Sixth District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 19, 1953. [24]

[Title of District Court and Cause.]

Nos. 11,879-PH and 14,627-PH

MINUTES OF THE COURT—JUNE 29, 1954

Present: Hon. Peirson M. Hall, District Judge.

Counsel for plaintiff: J. A. Caster an Howard Binford.

Counsel for Defendant: Bruce I. Hoch man, Ass't. U. S. Att'y.

Proceedings:

For trial. By stipulation of the parties It I Ordered that these two causes are Consolidated fo all purposes.

Counsel make statements.

Arthur G. Pollock is called, sworn, and testifie for plaintiff.

Plf's Ex. 1 is marked and admitted in evidence.

Plf's Ex. 2 and 3 are admitted in evidence.

F. W. Fahs is called, sworn, and testifies fo plaintiff.

Plf's Ex. 4 is admitted in evidence.

C. D. Melton is called, sworn, and testifies fo plaintiff.

Plaintiff rests.

Samuel G. Mahdesian is called, sworn, and testi fies for defendant.

Deft's Ex. A, B and C are admitted in evidence

Defendant rests, Plaintiff rests.

Court hears argument, and Orders judgment fo

plaintiff; counsel for plaintiff to prepare findings of fact, conclusions of law, and judgment.

EDMUND L. SMITH,
Clerk. [26]

[Title of District Court and Cause.]

Civil Action No. 11879—P.H.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding; Binford & Binford, by Howard M. Binford and James A. Caster, appearing as attorneys for the plaintiff, Stockholders Publishing Company, Inc., and Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, by Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for defendant.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral [27] and documentary, and the cause having been duly submitted to the Court for its decision, and the Court being fully advised in the premises, and after due consideration, now makes its Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That each and all of the allegations in plaintiff
complaint are true.

II.

That all of the denials and allegations in defen
ant's answer are untrue except as to those alleg
tions in defendant's answer which admit the trut
of allegations contained in plaintiff's complaint.

III.

That it is true that jurisdiction is conferred b
Title 28, Part IV, Chapter 85, Section 1340 of th
United States Code.

IV.

That it is true that the plaintiff, Stockholde
Publishing Company, Inc., is a corporation orga
ized under the laws of the State of Nevada, and ha
met all qualifications as a foreign corporation t
transact business in the State of California, an
that its principal place of business is in the City o
Los Angeles, County of Los Angeles and State o
California.

V.

That it is true that defendant, Harry C. Wes
over, was at all times mentioned in plaintiff's com
plaint, the Collector of Internal Revenue for th
Sixth Collection District of California, and that th
payments sought to be recovered by plaintiff in thi
action were made to him while he occupied the pos
tion of Collector of Internal Revenue, and were s

paid to him as the Collector of Internal [28] Revenue.

VI.

That it is true that on the 15th day of December, 1948, taxes and interest in the sum of Eight Thousand Sixty-eight Dollars and Fifty-one Cents ($8,068.51) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1943, and that on the 15th day of December, 1948, taxes and interest in the sum of Eight Thousand Nine Hundred Forty-four Dollars and Fifty-three Cents ($8,944.53) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1944, said taxes being paid pursuant to defendant's demand.

That it is true that the total amount of taxes and interest paid to the defendant by plaintiff, as aforesaid, is Seventeen Thousand Thirteen Dollars and Four Cents ($17,013.04).

VII.

That it is true that Claims for Refund were filed with the defendant on April 21, 1949, for the amount of the taxes to be refunded in the said sum of Seventeen Thousand Thirteen Dollars and Four Cents ($17,013.04), and on the ground that said taxes had been illegally collected by the said Harry C. Westover, as Collector of Internal Revenue, Sixth Collection District of California, in that the route district men and dealers in newspapers published by the plaintiff were not employees of plaintiff but were independent contractors.

That it is true that "Exhibit A" and "Exhibit B" attached to plaintiff's complaint are true copies of the said Claims for Refund filed by plaintiff with the said Harry C. Westover as Collector of Internal Revenue on April 21, 1949.

VIII.

That it is true that said Claims for Refund were not allowed or paid but were disallowed by the Commissioner of Internal Revenue. That it is true that the copy of a letted dated October 20, 1949, attached to plaintiff's complaint and marked "Exhibit C," is a true [29] and correct copy of the letter wherein plaintiff was informed of the disallowance of its said claim.

IX.

That it is true:

(a) That in the years 1943 and 1944 plaintiff was in the business of publishing a daily newspaper, the "Daily News," at Los Angeles, California.

(b) That said plaintiff, as publisher and distributor of said "Daily News" sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by said route district men and dealers.

That it is true that said route district men and dealers resold or offered for resale, the newspapers so purchased by them, and that it is true that they retained any excess over the cost of said newspapers to them as their profits in the transaction.

(c) That the Commissioner of Internal Revenue erroneously found and determined that the route

district men and dealers were employees of the plaintiff and not independent contractors. That it is true that the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error, the amount of Seven Thousand Five Hundred Fifty-eight Dollars and Fifty-two Cents ($7,558.52) was assessed by said Commissioner against the plaintiff for the year 1943, with interest thereon in the sum of Five Hundred Nine Dollars and Ninety-nine Cents ($509.99), making a total of Eight Thousand Sixty-eight Dollars and Fifty-one Cents ($8,068.51). That as a result of the Commissioner's error, the amount of Eight Thousand Three Hundred Seventy-nine Dollars and Seventeen Cents ($8,379.17) was assessed [30] by said Commissioner against the plaintiff for the year 1944, with interest thereon in the sum of Five Hundred Sixty-five Dollars and Thirty-six Cents ($565.36), making a total of Eight Thousand Nine Hundred Forty-four Dollars and Fifty Cents ($8,944.50). That it is true that the aggregate of said assessments, to wit, the said sum of Seventeen Thousand Thirteen Dollars and Four Cents ($17,013.04), was duly paid by plaintiff on the 15th day of December, 1948, to and upon the demand of the defendant, Harry C. Westover, as Collector of Internal Revenue.

X.

That it is true that said route district men and dealers were not employees of the plaintiff. That it is true that the said route district men and dealers were independent contractors. That it is true that the profits earned by them from the resale of newspapers, as aforesaid, are non-taxable under the Federal Unemployment Tax Act.

XI.

That it is true that the assessment and collection of said taxes and interest thereon in the total sum of Seventeen Thousand Thirteen Dollars and Four Cents ($17,013.04) was erroneous and illegal.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds:

I.

That the route district men and dealers were not and are not employees of the plaintiff; that said route district men and dealers were and are independent contractors, and that the profits earned by them from the resale of the newspapers purchased by them from plaintiff were not and are not taxable under the Federal [31] Unemployment Tax Act.

II.

That the plaintiff, Stockholders Publishing Company, Inc., is entitled to judgment against the defendant, Harry C. Westover, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Seventeen Thousand Thirteen Dollars

and Four Cents ($17,013.04), plus interest in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of $.....

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [32]

District Court of the United States for the Central Division of the Southern District of California
Civil Action No. 11879-P.H.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California, JOHN DOE, and RICHARD ROE,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford, by Howard M. Binford, and James M. Caster appearing as attorneys for plaintiff Stockholders Publishing Company, Inc., and Laughlin E. Waters, United States

Attorney, by Robert H. Wyshak and Bruce
Hochman, appearing as attorneys for the defendan
Harry C. Westover, Former Collector of Interna
Revenue, Sixth Collection District of California.

Both oral and documentary evidence was offere
by the parties plaintiff and defendant, and th
Court having heard and examined and given du
consideration to such evidence, both oral [34] an
documentary, and the cause having been duly sub
mitted to the Court for its decision, and the Cou
having heretofore caused to be filed herein, it
written Findings of Fact and Conclusions of Law
and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decree
that plaintiff Stockholders Publishing Company
Inc., a corporation, have and recover judgmer
against Harry C. Westover, Former Collector o
Internal Revenue, Sixth Collection District of Cal
fornia, in the sum of Seventeen Thousand Thirtee
Dollars and Four Cents ($17,013.04), together wit
interest thereon in accordance with the provisior
of Title 28, United States Code, Section 2411, to
gether with costs in the sum of $19.00.

Dated this 14th day of July, 1954.

/s/ PIERSON M. HALL.

Approved as to form.

July .., 1954.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [35]

[Title of District Court and Cause.]

Civil Action No. 14627-P.H.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford by Howard M. Binford, and James A. Caster appearing as attorneys for the plaintiff Stockholders Publishing Company, Inc., and Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, by Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for defendant.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral and documentary, and the cause having been duly submitted to the [37] Court for its decision, and the Court being fully advised in the premises, and after due consideration, now makes its Findings of Fact and Conclusions of Law, to wit:

Findings of Fact

I.

That each and all of the allegations in plaintiff's complaint are true.

II.

That all of the denials and allegations in defendant's answer are untrue except as to those allegations in defendant's answer which admit the truth of allegations contained in plaintiff's complaint.

III.

That it is true that jurisdiction is conferred by Title 28, Part IV, Chapter 85, Section 1340 of the United States Code.

IV.

That it is true that the plaintiff Stockholders Publishing Company, Inc., is a corporation organized under the laws of the State of Nevada, and has met all qualifications as a foreign corporation to transact business in the State of California, and that its principal place of business is in the City of Los Angeles, County of Los Angeles and State of California.

V.

That it is true that defendant Robert A. Riddell was at all times mentioned in plaintiff's complaint the Collector of Internal Revenue for the Sixth Collection District of California, and that the payments sought to be recovered by plaintiff in this action were made to him while he occupied the position of Collector of Internal Revenue, and were so paid to him as the Collector of Internal [38] Revenue.

VI.

That it is true that on the 12th day of July, 1950 taxes and interest in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four

Cents ($8,796.64) were paid to the defendant by plaintiff for the taxable year ending on December 31, 1945, pursuant to defendant's demand.

VII.

That it is true that a Claim for Refund was filed with the defendant on July 31, 1950, for the amount of the taxes to be refunded in the said sum of Eight Thousand Six Hundred Seventy-one Dollars and Fifty-one Cents ($8,671.51), and on the ground that said taxes had been illegally collected by the said Robert A. Riddell, as Collector of Internal Revenue, Sixth Collection District of California, in that the route district men and dealers in newspapers published by the plaintiff were not employees of plaintiff but were independent contractors.

That it is true that "Exhibit A" attached to plaintiff's complaint is a true copy of the said Claim for Refund filed by plaintiff with the said Robert A. Riddell as Collector of Internal Revenue on July 31, 1950.

VIII.

That it is true that said Claim for Refund was not allowed or paid but was disallowed by the Commissioner of Internal Revenue. That it is true that the copy of a letter dated October 27, 1950, attached to plaintiff's complaint and marked "Exhibit B," is a true and correct copy of the letter wherein plaintiff was informed of the disallowance of its said claim.

IX.

That it is true:

(a) That in the year 1945 plaintiff was in the business of publishing a daily newspaper, the "Daily News," at Los Angeles, [39] California.

(b) That said plaintiff, as publisher and distributor of said "Daily News" sold newspapers to certain route district men and dealers at a wholesale price and was paid therefor by said route district men and dealers.

That it is true that said route district men and dealers resold or offered for resale, the newspapers so purchased by them, and that it is true that they retained any excess over the cost of said newspapers to them as their profits in the transaction.

(c) That the Commissioner of Internal Revenue erroneously found and determined that the route district men and dealers were employees of the plaintiff and not independent contractors. That it is true that the Commissioner of Internal Revenue erroneously determined that the excess of the said selling price of such newspapers by the route district men and the dealers over the wholesale price paid to plaintiff, was taxable under the Federal Unemployment Tax Act.

(d) That as a result of the Commissioner's error, the amount of Eight Thousand Six Hundred Seventy-one Dollars and Fifty-one Cents ($8,671.51) was assessed by said Commissioner against the plaintiff for the year 1945, with interest thereon in

the sum of One Hundred Twenty-five Dollars and Thirteen Cents ($125.13), making a total of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents ($8,796.64). That it is true that the aggregate of said assessments, to wit, the said sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents ($8,796.64), was duly paid by plaintiff on the 12th day of July, 1950, to and upon the demand of the defendant Robert A. Riddell, as Collector of Internal Revenue.

X.

That it is true that said route district men and dealers [40] were not employees of the plaintiff. That it is true that the said route district men and dealers were independent contractors. That it is true that the profits earned by them from the resale of newspapers, as aforesaid, are non-taxable under the Federal Unemployment Tax Act.

XI.

That it is true that the assessment and collection of said taxes and interest thereon in the total sum of Eight Thousand Seven Hundred Ninety-Six Dollars and Sixty-four Cents ($8,796.64) was erroneous and illegal.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds:

I.

That the route district men and dealers were not and are not employees of the plaintiff; that said

route district men and dealers were and are independent contractors, and that the profits earned by them from the resale of the newspapers purchased by them from plaintiff were not and are not taxable under the Federal Unemployment Tax Act.

II.

That the plaintiff Stockholders Publishing Company, Inc., is entitled to judgment against the defendant Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents ($8,796.64), plus interest in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of $.....

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954. [41]

District Court of the United States for the Central Division of the Southern District of California

Civil Action No. 14627-P.H.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California, JOHN DOE, and RICHARD ROE,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court on the 29th day of June, 1954, the Honorable Peirson M. Hall, Judge, presiding, Binford & Binford, by Howard M. Binford, and James M. Caster appearing as attorneys for plaintiff Stockholders Publishing Company, Inc., and Laughlin E. Waters, United States Attorney, by Robert H. Wyshak and Bruce I. Hochman, appearing as attorneys for the defendant Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California.

Both oral and documentary evidence was offered by the parties plaintiff and defendant, and the Court having heard and examined and given due consideration to such evidence, both oral and documentary, and the cause having been duly submitted to the [43] Court for its decision, and the Court

having heretofore caused to be filed herein, its written Findings of Fact and Conclusions of Law, and being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff Stockholders Publishing Company Inc., a corporation, have and recover judgment against Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, in the sum of Eight Thousand Seven Hundred Ninety-six Dollars and Sixty-four Cents ($8,796.64), together with interest thereon in accordance with the provisions of Title 28, United States Code, Section 2411, together with costs in the sum of $19.00.

Dated this 14th day of July, 1954.

/s/ PEIRSON M. HALL.

Receipt of Copy acknowledged.

Lodged July 9, 1954.

[Endorsed]: Filed July 14, 1954.

Docketed and entered July 16, 1954. [44]

[Title of District Court and Cause.]

No. 11879-PH Civil

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys Binford & Binford, 1208 Hollingsworth Building, Los Angeles, California, and James A. Caster, 714 W. Olympic Boulevard, Los Angeles, California:

You, and Each of You, Are Hereby Advised that the defendant, Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment for plaintiff entered June 29, 1954, and from the judgment entered July 16, 1954, in the above-entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant United States Attorney;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant,
Harry C. Westover.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1954. [46]

[Title of District Court and Cause.]

No. 14627-PH Civil

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys Binford & Binford, 1208 Hollingsworth Building, Los Angeles, California, and James A. Caster, 714 W. Olympic Boulevard, Los Angeles, California:

You, and Each of You, Are Hereby Advised that the defendant, Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, does hereby appeal to the Court of Appeals for the Ninth Circuit from the order for judgment for plaintiff entered June 29, 1954, and from the judgment entered July 16, 1954, in the above-entitled case.

Dated: This 26th day of August, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant United States Attorney;

/s/ BRUCE I. HOCHMAN,
Attorneys for Defendant, Robert A. Riddell.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 26, 1954. [48]

[Title of District Court and Cause.]

No. 11879-PH Civil

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Upon motion of defendant-appellant, Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the appeal in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 24th day of November, 1954.

Dated: This 30th day of September, 1954.

/s/ PEIRSON M. HALL,
United States District Judge.

Presented by:

/s/ BRUCE I. HOCHMAN,
Assistant United States
Attorney.

[Endorsed]: Filed September 30, 1954. [53]

[Title of District Court and Cause.]

No. 14627-PH Civil

ORDER EXTENDING TIME TO DOCKET CAUSE ON APPEAL

Upon motion of defendant-appellant, Robert A Riddell, Collector of Internal Revenue, Sixth Col lection District of California, and good cause ap pearing therefor:

It Is Hereby Ordered that the time within whic to file the record and docket the appeal in th United States Court of Appeals for the Ninth Cir cuit be, and the same is hereby, extended to and in cluding the 24th day of November, 1954.

Dated: This 30th day of September, 1954.

/s/ PEIRSON M. HALL,
United States District Judge

Presented by:

/s/ BRUCE I. HOCHMAN,
Assistant United States Attorney.

[Endorsed]: Filed September 30, 1954. [54]

In the United States District Court, Southern District of California, Southern Division
No. 11879-PH Civil

Honorable Peirson M. Hall, Judge Presiding.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

HARRY C. WESTOVER, Etc., Et Al.,

Defendants.

No. 14627-PH Civil

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Plaintiff,

vs.

ROBERT A. RIDDELL, Etc., Et Al.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiffs:
BINFORD and BINFORD, By
HOWARD M. BINFORD, Esq.; and
JAMES A. CASTER, Esq.

For the Defendants:
LAUGHLIN E. WATERS,
United States Attorney;
BRUCE I. HOCHMAN,
Assistant United States Attorney.

June 29, 1954; 11:00 A.M.

The Court: We will have the morning recess and then I guess you are ready to go ahead in the Stockholders Publishing matter?

Mr. Hochman: Yes, your Honor.

Mr. Binford: Yes.

The Court: Do you have any pre-trial memorandum or statement or opening statement or anything here?

Mr. Binford: We have an opening statement that the plaintiffs will make, but an examination of the pleadings will disclose that all issues have been resolved except whether or not the tax was illegally collected, assessed, and collected, or not.

The Court: And which turns on the question as to whether or not the newspaper distributors were independent contractors or employees.

Mr. Binford: Principally, that is right. And the rest of the pleadings, the Government pleadings admit all other pertinent allegations.

The Court: Very well.

You do not have any statement, Mr. Hochman?

Mr. Hochman: No, your Honor.

The Court: Very well. We will have the morning recess.

(Short recess.) [5*]

The Court: I do not think that there has been any order for the consolidation of these two cases for all purposes. Is there any reason why such an order should not be made?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Hochman: No, your Honor.

Mr. Binford: There is not, your Honor.

The Court: Both counsel agree to it?

Mr. Hochman: So agreed.

Mr. Binford: Yes, your Honor.

The Court: Upon the stipulation of counsel a minute order will be made consolidating Case No. 11879 and Case No. 14627 for all purposes.

Now you say you have an opening statement, Mr. Binford?

Mr. Binford: Mr. Caster and I will be trying this case jointly and Mr. Caster is prepared to make an opening statement at this time.

The Court: Very well.

Opening Statement on Behalf of the Plaintiff

Mr. Caster: These two cases, the Stockholders Publishing Company vs. Westover and the Stockholders Publishing Company vs. Riddell, involve the same facts. The only difference is the names and the dates and the amounts involved. Both actions are brought to recover Federal unemployment taxes which the plaintiff alleges were illegally collected.

The first case, the case against Westover, covers the years 1943 and 1944, and the second case covers the year 1945. [6]

It involves the taxes that were paid under the Federal Unemployment Tax Act based on workers who were engaged in distributing the Daily News which is published by the plaintiff corporation. These men were designated as route district men and dealers.

It is the contention of the plaintiff that the route

district men and dealers are independent contractors and that as such their earnings are not the basis for a tax under unemployment insurance.

The Court: Are route district men and dealers the same men or are there two classes?

Mr. Caster: There are two classes of men. They are very similar.

With the exception of the allegation that the taxes are illegally collected, the Government has admitted practically all of the allegations that are submitted.

In order to get this matter clearly before the court, it might be well at this time to review briefly the so-called social security taxes.

The Court: Just before you do that, the Government by its answer has admitted that the Stockholders Publishing Company is a corporation and all of your jurisdictional allegations, that the taxes and interest were assessed and paid, that the claim for refund was filed at the time alleged and it was denied, and that this suit is brought within the [7] statutory period, and then the refusal of the refund?

Mr. Caster: That is correct.

The Court: Very well.

Mr. Caster: There are three so-called social security taxes, or tax laws.

The first has to do with the tax that is levied and collected by the State. That tax is a tax on the employees which is required to be withheld by the employer and after contributing his portion of the tax is paid to the State.

The Court: Do you mind if I interrupt you?

Mr. Caster: No, that is all right.

The Court: I see that these taxes involve the years 1943, '44, and '45. I take it there have been amendments of the statute since those dates, so in giving me the statute will you give me the applicable statute and the statutory reference?

Mr. Caster: I will briefly outline these laws as they were in effect for the years 1943, '44, and '45.

The Court: Very well. And give me the statutory reference.

Mr. Caster: Yes.

As I stated, the State levies a tax on the employee which is required to be withheld by the employer and the employer is also taxed on the payroll for the salary, wages and commissions of the employee, and that is required to be paid [8] by the employer to the State of California.

In connection with the district men and dealers, the State of California has ruled that they are not employees and as a result no tax has been levied against the employee and the employer has not paid that tax.

The second social security law is the Federal Old Age Benefit Act. That likewise imposes a tax on the employee which is required to be withheld by the employer and after paying his contribution must pay the amount due the State each quarterly period.

The Court: To the State?

Mr. Caster: To the Federal Government, I should say.

That tax has never been imposed on the route dis
trict men today and the dealers and the Governmen
has never asked that that tax be paid by this tax
payer.

The third social security law is the one that is in
volved in this action. It imposes a tax on the em
ployer alone and is based on the first $3,000 o
wages or salaries that have been earned by em
ployees up to the first $3,000.

The Court: This is the unemployment tax?

Mr. Caster: That is the Federal unemploymen
tax.

That tax is a 3 per cent tax with a 90 per cen
credit when one complies with the requirements o
the State law in paying the tax that is due the State

Now from this outline it can reasonably be note
that if [9] these men are employees then there ma
be a tax due, but if they are independent contractor
then the plaintiff, as the plaintiff alleges, they ar
exempt from paying this tax.

There is, however, a matter that I want to call t
the attention of the court at this time, and that i
regarding the 90 per cent credit that I mentioned

The largest tax that can be assessed by the Stat
against an employer is 2.7 per cent. That was tru
in the years in which this tax is involved and it i
true today.

But the State may from time to time reduce tha
percentage depending on the circumstances an
even to the extent of only 1 per cent, or ½ per cen
or even to zero, which it does in a great many cases

But when that tax is reduced the credit that is allowed by the Federal Government on the social security tax is 90 per cent of what the tax would have been had they been obligated to pay the full 2.7 per cent. But in this particular case the Government has allowed no credit and in that we consider that they have erred in computing the tax.

With reference to that provision of the law I cite Section 1601(b) of the Internal Revenue Code.

The Court: Is it the same now as it was then?

Mr. Caster: It is the same now as it was then.

The Court: You mean there have been no amendments?

Mr. Caster: Not to that phase of the law. [10]

It is said that in administering the social security laws if there is any variation or any leaning one way or the other that it should be toward the employee because it is supposed to be a benefit to the working man.

But in this instance there can be no benefit obtained by these route district men or dealers from this tax. The Federal Unemployment Tax Act creates a vast fund from which the Federal Government pays to the State that has a social security law and enables them to pay from that fund the unemployment to the people who are covered. But in this case the district men and dealers are not covered by the Unemployment Tax Act.

The Court: Of the State?

Mr. Caster: Of the State.

The Court: At all?

Mr. Caster: No, not at all.

The Court: So there is no credit?

Mr. Caster: There is no credit. They have allowed no credit.

The Court: They have allowed no credit?

Mr. Caster: They have allowed no credit, but we contend that even if there is a tax they should have allowed the credit just the same.

The Court: You mean even if there is no tax?

Mr. Caster: That is right. [11]

The Court: In other words, your position is that there being no tax you are entitled to the maximum credit?

Mr. Caster: That is right.

But the point is that the district men and dealers could never receive the benefit from the tax that the Stockholders Publishing Company has been required to pay because they aren't covered by the State and since they aren't covered by the State there is no possibility that they could ever receive any unemployment insurance because——

The Court: From this money?

Mr. Caster: From this money or any money. The Federal Government doesn't pay to the covered employee.

The Court: In other words, it only pays to those who are covered by the State law?

Mr. Caster: No, it doesn't even pay them. It only pays to the State and the State in turn pays to those who are covered. So it is impossible for the employees here, or the district men and dealers, to ever receive any benefit from the tax that is being paid.

The Court: Very well.

Mr. Caster: This court knows that there is a tendency from time to time for one department of the Government to infringe on the rights and duties of some other department of the Government, and that is exactly what has happened in administering the social security laws. And that resulted in a [12] big debate in Congress in 1948.

The Government took the position that the social security laws applied to people whether they were independent contractors or employees and as a result Congress passed Public Law No. 642—that was in the 80th Congress and was enacted on June 14, 1948.

I cite that law as Congressional Service, Volume I, 1948, page 449. And in enacting that law it was discussing the question of who was and who was not an employee, and as a result of that law, Section 1426(d) and Section 1607(i) of the Internal Revenue Code was amended.

That amendment inserted before the period, at the end of each, the following—they were discussing the term "employee"—"such term does not——"

The Court: Just a minute now. I found 1607.

Mr. Caster: It is 1607(i).

The Court: Is that in parentheses, little "i"?

Mr. Caster: Yes, little "i."

The Court: Yes?

Mr. Caster: And that is the amendment that affects the Internal Revenue Code with reference to Federal unemployment and it is directly in point here.

The other was amended but that has reference t the old age pension so I think you are intereste principally in 1607(i). [13]

The Court: Go ahead:

Mr. Caster: "But such term (meaning the em ployee) does not include (1) any individual wh under the usual common law rules applicable in de termining the employer and employee relationshi has the status as independent contractor or (2) an individual except an officer of a corporation who i not an employee under such common law rules.' Then (b) under that amendment:

"The amendment made by Section——"

The Court: Just a moment. That is 1426(d)?

Mr. Caster: 1426(d) and 1607(i). I don't thin you are interested in 1426 because it doesn't appl here.

The Court: What are you going to read fro now?

Mr. Caster: The same thing. This is the amend ment that was made by Public Law 642 to both o these sections, 1426(d) and 1607(i). They both ap ply the same. In fact, these laws are so correlate that whatever is true of one is principally true o the other.

The Court: Very well. Now this is 1426(d)?

Mr. Caster: That is right.

The Court: The term employee?

Mr. Caster: That is right.

Then in 1426(d) and 1607(i) under (b) of tha amendment:

"The amendment made by Subsection (a) shall have [14] the same effect as if——"

The Court: Subsection (a) of what? You were talking about 1426(d) and 1607(i) and now you are talking about Subsection (a). Of what?

Mr. Caster: Of this Public Law 642, page 449. Section (b) provides that the amendment made by Subsection (a) shall have the same effect as if included in the Internal Revenue Code on February 10, 1939, the date of its enactment.

In other words, the Congress is saying that what we meant, or what we mean now and what we meant when the law was enacted, that the employer-employee relationship is to be determined by common law rules and the status of an independent contractor is not now and never has been the subject of the collection of social security tax.

Now the application of the social security taxes is more than merely levying and collecting a tax; it imposes upon the employer an obligation to keep records. Those records must show the people who he employs and the time that they work, the amount of money that he pays them, so that the tax can be determined.

But with reference to district men and dealers it is impossible for the employer to keep that information. He has no knowledge of how much money the dealers make because they buy their papers from him and sell them. They buy them at a wholesale price and sell them at something higher than [15] that wholesale price that they paid. The taxpayer

in this case has no means of determining how much money they make.

Now when all the evidence is in we feel confident that this court will recognize that these district men and dealers are not employees and not subject to the tax but that they are independent contractors.

The Court: Thank you.

Do you have a statement to make, Mr. Hochman?

Mr. Hochman: Just a short statement, your Honor.

Opening Statement on Behalf of the Government

Mr. Hochman: Your Honor, the Government contends in this case here in question that the people involved are employees of the Stockholders Publishing Company in both cases before this court.

Relative, your Honor, to what the State of California has ruled, if it please the court, we are seeking an independent determination in this court as to what this court feels this situation bespeaks. You have here a chicken-and-an-egg situation. Perhaps the State of California didn't act because the Federal courts did not act, and for the Federal courts not to act because the State court may not have acted is to run in a merry-go-round.

Your Honor, the Government wishes that these facts speak for themselves and we want an independent determination as to whether these individuals are independent [16] contractors or employees.

Further, your Honor, in the consideration of the facts—and it gets down basically to a fact consideration under common law principles well known

to this court—we want a consideration as to policy, scope and intent of the statute under which we are operating.

The Court: I take it from what you have said up to now you concede that if they are independent contractors as a matter of fact the plaintiff is entitled to recover its refund?

Mr. Hochman: Yes, your Honor.

The Court: Well, that seems to be the sole question.

Mr. Hochman: There is no purpose to confound or confuse an issue. That basically is this case.

The Court: Very well.

Mr. Hochman: But in the determination, your Honor, of whether they are independent contractors or whether they are employees in employing the common law principles—and this bespeaks a certain amount of difficulty in all cases—the policy, import and intent of the statute is, the Government contends, very material. We have a statute in which people are to be benefited. To argue that there is no benefit because the people will not benefit because they receive nothing from the State and the Government only gives the money to the State is to beg a question. If the tax is proper then by [17] petitioning the State the money is paid and they can get it.

As I say, the case would only be compounded by going into State matters. However, the independent consideration here will go a long way to determine this issue.

The Court: Then, if I understand you correctly,

the legal question is governed by the amendment of 1948 which defines the word "employee"?

Mr. Hochman: Yes, your Honor.

The Court: Very well.

Mr. Hochman: The facts will reveal, your Honor, in the plaintiff's case, and if not in the plaintiff's case then in the defendants' case, that the plaintiff here has knowledge of what the dealers make by simple computation.

Not only do they know what they sell the papers for, they know what the papers are sold for, and they know what they are sold for to the newsboys and how much the newsboys make. They know therefore the maximum amount the man makes in terms of number of papers he purchases and the profit per paper.

The Court: Do they know the number of hours that he works?

Mr. Hochman: Well, your Honor, there will be a minimum number of hours that he must work relative to contracts that will be in evidence, a collective bargaining agreement of the Guild with the plaintiff. [18]

There is also, as the court will see, individual contracts and there must be a reconciliation of the two contracts, an unfortunate situation which will pose certain difficulties.

The evidence, the Government contends, will reveal that these men are within the control of the Stockholders Publishing Company and that the common law principles and the policy of the statute, when considered in the light of the evidence

(Testimony of Arthur G. Pollock.)

will, the Government contends, lead this court to a conclusion that these men are not independent contractors.

The Court: Very well. Call your witnesses.

Mr. Binford: Mr. Pollock, please.

ARTHUR G. POLLOCK

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please.

The Witness: Arthur G. Pollock; P-o-l-l-o-c-k.

The Clerk: And your address?

The Witness: 658 Canterbury Road, San Marino.

Direct Examination

By Mr. Binford:

Q. Mr. Pollock, what is your occupation?

A. At the present time I am business manager.

Q. Of what?

A. Of the Daily News, which is owned by the Stockholders Publishing Company. [19]

Q. How long have you been employed by the Stockholders Publishing Company?

A. Ever since it began.

Q. And that was when? A. 1929.

Q. And since 1929 what various occupations and jobs have you had with Stockholders Publishing Company?

(Testimony of Arthur G. Pollock.)

A. Assistant auditor, and then as auditor of th Huntingington Park Signal, which was a wholly owned subsidiary of the Stockholders Publishin Company, and then business manager of the Signal then auditor of the Post Publishing Company which was controlled by the Stockholders Publish ing Company, and then assistant auditor of th Post and the Stockholders Publishing Company later auditor of both, and then business manage of the Stockholders Publishing Company, circula tion director for a period of approximately a yea and a half, and then business manager. I held th position of treasurer for a period of time and assist ant secretary. I am now assistant secretary an business manager.

Q. Well, during this approximately 25-yea period you therefore have held enough varied posi tions so that you are well acquainted with the gen eral operation of the newspaper business, I take it

A. That is right.

Q. And are you familiar with the over-all opera tion of [20] the circulation department of the Dail News? A. The over-all picture, yes.

Q. And is that over-all picture the same sub stantially today or different than during 1943, '44 and '45?

A. Substantially the same now as in '43, '44, an '45.

Q. Now tell us about the operation and the dis tribution of the Daily News as conducted by rout

(Testimony of Arthur G. Pollock.)

district men and dealers. How do they operate? What do they do? How does it work?

Mr. Hochman: May it please the court, I object to that as too general. I would like to pinpoint it as to the year.

Mr. Binford: During 1943, '44 and '45. He has already said it was substantially the same today.

Q. But during the years '43, '44, and '45, Mr. Pollock.

A. Well, during that period route men and dealers purchased their papers at varied wholesale rates. They in turn resell those papers to the carrier boys. The carrier boys in turn sell them at retail to the subscriber.

The Court: There was a period of time when the Daily News did not have street sales or you did not make delivery?

The Witness: No, there has never been a time when we didn't have both.

The Court: Is that right?

The Witness: We have always had street sales and home delivery. [21]

Q. (By Mr. Binford): Now you mentioned that you sell the papers initially to the dealers and route district men——

The Court: What do you mean by "route district men"? What is a route district man?

The Witness: Well, that is the term that has been used for those individuals that we have sold the papers to primarily in the city.

The dealers have been the men that have served

(Testimony of Arthur G. Pollock.)

the areas in what we call the 10-mile zone and out side of that, and that terminology is more or les for Audit Bureau circulation standards.

The Court: The Audit Bureau circulation being a national organization?

The Witness: That is right.

The Court: Which makes an audit on the actua circulation for the purpose of fixing advertising rates?

The Witness: That is right.

The Court: And that term "route man" and "dealers" is a term which is commonly used in al newspapers in this area?

The Witness: Well, I would say so. However, I wouldn't like to state definitely what the other pa pers do call them.

The Court: Now a route district man, I take it is somebody who has, say, the West Adams district

The Witness: That is correct. [22]

The Court: In other words, he buys papers from you for resale to carrier boys in the West Adam district?

The Witness: That is correct.

The Court: So the city is divided into districts

The Witness: That is correct.

The Court: Then the dealers are outside o those districts?

The Witness: That is right.

The Court: And the dealers include people t the ultimate extent of your circulation?

The Witness: Yes.

(Testimony of Arthur G. Pollock.)

The Court: Which is to where, Phoenix?

The Witness: No, we don't have anything in Phoenix. I would say Ontario, Santa Ana, Santa Monica, Long Beach, all the surrounding territory.

The Court: Within Los Angeles County?

The Witness: Well, even outside of Los Angeles County; in Orange County, even to Ventura.

The Court: San Diego?

The Witness: I am not sure at the present time what our setup is in San Diego.

The Court: Very well.

Q. (By Mr. Binford): Now you mentioned that you sell to the dealers and route district men at varying wholesale prices. Will you [23] explain that, and why?

A. We have no set rate for the reason depending on conditions in that particular area. One area, for instance, may be scattered as to the subscribers, which would take more time, they would be able to handle less papers, the terrain may be hilly, so it may be necessary even to have a car route where a boy on a bicycle couldn't deliver.

All those factors are taken into consideration.

The Court: And in those cases they buy their papers wholesale from you at lesser rates?

The Witness: That is right.

Q. (By Mr. Binford): Then they, as you testified, resell the papers to the carrier boys. Do you fix the price at which they should sell these papers to the carrier boys?

(Testimony of Arthur G. Pollock.)

A. No, those prices are fixed to a degree b consultation. There is a range that we suggest i order to, shall I say, protect the carrier boys fro some unscrupulous dealer who might take advantag of them.

Q. Do the district men in fact sell to carri boys, different district men, at different prices?

A. Oh, definitely.

Q. And why is that?

A. Well, I think that would be for the sam reason that we have different prices to the dealer It is depending [24] on the terrain and the numbe of subscribers. A good example would be of a ne subdivision being opened up, and you want to sta a route in there. Well, you have to start from zer That boy is going to have to be given somethin for his efforts, and a boy with ten papers, his rat is certainly going to be different from that of a bo with 50 or more.

Q. Now a boy delivers the paper to the sub scriber and supposing a subscriber didn't pay hi bill and moved away. Who stands the loss if tha money is never collected?

A. That would be between the dealer and th carrier boy.

Q. Does the Daily News stand the loss in an event?

A. Not unless the dealer would come in an negotiate something.

The Court: When the route district men an the dealers buy, they pay you direct?

(Testimony of Arthur G. Pollock.)

The Witness: Yes, sir, on a monthly basis.

The Court: You bill them and they pay you?

The Witness: We bill them for the number of papers they draw each month, but they can change their draw daily. Whatever they draw each month is totaled at the end of the month and they are billed for that at whatever their rate is.

Q. Then it is up to them to collect ultimately from either the newsboy or the subscriber?

A. That is right. [25]

(Exhibiting document to counsel.)

Q. (By Mr. Binford): Mr. Pollock, I will show you a form of agreement——

The Clerk: Plaintiff's Exhibit 1.

The Court: Plaintiff's Exhibit 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Binford): I notice it is dated in April, 1943. I will ask you to examine that agreement and tell us whether or not that agreement is the agreement that the Daily News signed between it and the route district men and dealers and was in effect all during '43, '44, and '45.

A. That is the agreement that was signed and was in effect during those three years.

Mr. Binford: We offer that as Plaintiff's Exhibit 1.

The Court: Admitted in evidence.

(Testimony of Arthur G. Pollock.)

(The document referred to was received i evidence and marked Plaintiff's Exhibit No. 1.

The Court: This printed form, you mean, is th agreement?

The Witness: That is right.

The Court: This is an executed agreement——

Mr. Binford: That is an original agreement.

The Court: ——by Mr. Betancourt. [26]

Mr. Binford: The fact that it is signed is nc pertinent here. The purpose of its offer is merel to show the form that was in effect during thos years.

The Court: Very well.

Q. (By Mr. Binford): Now under the prov sions of that agreement you require a bond of som sort to be put up by the dealers and route distric men, is that correct? A. Correct.

Q. How much is that bond, and tell us abou the bond, what it is for.

A. Well, the bond varies of course in amour and it is arrived at basically on the basis of on and one-half months paper bill. It is used as co lateral against the non-payment of the circulatio bill.

Q. And what is it, is it a cash bond or is it se curities or does it vary depending upon a particula district man or dealer?

A. Well, I would say with the exception o probably two or three cases it is a cash bond.

Q. Now a dealer orders a certain number o

(Testimony of Arthur G. Pollock.)

papers per day with you, is that correct, of the Daily News? A. That is correct.

The Court: They vary from day to day?

The Witness: That is correct. [27]

Q. (By Mr. Binford): It may be up or down day by day? A. That is right.

Q. Supposing he orders ten too many on a given day and you billed him at three and a half cents per paper. Does he lose that 35 cents or is he permitted to return these papers to the Daily News?

A. Well, now, when you say three and a half cents, you mean whatever his rate is?

Q. Whatever his rate is.

A. Whatever he orders he pays for.

The Court: Regardless of whether he sells them or not?

The Witness: That is right.

The Court: Has the plaintiff in the case at any time carried workman's compensation insurance on any of the dealers or route district men?

The Witness: Yes, I believe they have from time to time. I couldn't swear to that.

The Court: Did they make it a practice?

The Witness: In those years I wouldn't like to say definitely whether they did or didn't. The reason for it has been the fact that it has been practically impossible to determine from a workman's compensation as to whether we would be liable or not.

The Court: In other words, you carry it as a measure [28] of——

(Testimony of Arthur G. Pollock.)

The Witness: Self-protection.

The Court: ——self-protection?

The Witness: Yes.

The Court: The same as the schoolteacher carries liability insurance for injury to a pupil?

The Witness: But I couldn't say during those years whether we were paying it at that time or not

Q. (By Mr. Binford): Now with respect to the route district men and dealers, do you make a deduction—if that were possible—for social security for these men? A. No.

Q. Men? A. No.

Q. And do you deduct any sort of withholding tax, withholding on income from these men?

A. No.

Q. And do you pay to the State of California any amount of money for unemployment?

A. No.

(Exhibiting document to counsel.)

Mr. Binford: I at this time offer a letter, which I will presently identify with the witness, dated February 13, 1947, addressed to Stockholders Publishing Company, Inc., [29] and signed by H. E. Minear, Principal Auditor, State of California, Department of Employment.

The Clerk: Plaintiff's Exhibit No. 2.

The Court: For identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

(Testimony of Arthur G. Pollock.)

Mr. Binford: I will ask that that be shown to the witness and ask him to read that letter.

Mr. Hochman: Your Honor, I object to the reading of the letter.

Mr. Binford: I am sorry. I didn't mean out loud. Read it to himself.

The Witness: (Examining exhibit.)

The Court: Do you have other documents, Mr. Binford, which you expect to produce?

Mr. Binford: Well, I do have an income tax form but I am sure counsel for the Government will not object to it.

The Court: Have you shown your documents to counsel?

Mr. Binford: Yes, I have, your Honor.

The Court: Do you have documents that you expect to rely on?

Mr. Hochman: Yes, your Honor.

The Court: Have you exhiibted them to Mr. Binford?

Mr. Hochman: Yes, your Honor. They are basically his documents. [30]

The Court: Very well. We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clook noon, a recess was taken until 2:00 o'clock p.m., of the same date.) [31]

June 29, 1954; 2:00 P.M.

The Court: Any ex parte matters?

The Clerk: Yes, your Honor.

(Other court matters.)

The Court: Very well. We will resume with the Stockholders Publishing Company matter.

Mr. Binford: Mr. Pollock, will you resume the stand.

ARTHUR G. POLLOCK

the witness on the stand at the time of recess, resumed the stand and testified further as follows:

Mr. Binford: May I have the last statement Mr. Reporter, that I made? I don't know whether I made an offer of Plaintiff's Exhibit 2 or not.

The Court: No, you did not. You had just asked him to read it and he was reading it when I recessed.

Direct Examination
(Continued)

By Mr. Binford:

Q. Have you completed the reading of it?

A. I have.

Mr. Binford: At this time I offer Plaintiff's Exhibit 2 for identification into evidence as Plaintiff's Exhibit 2.

Mr. Hochman: I object to that, your Honor. The general ground is that it is immaterial.

The Court: There is no foundation laid for [32] it.

Mr. Hochman: It is not the foundation I have objection to.

(Testimony of Arthur G. Pollock.)

The Court: You waive the foundation?

Mr. Hochman: Yes, your Honor.

The Court: Very well. And by that I take it you concede that the letter was written on or about the date it bears from the parties it purports to be from and received by the patries to which it is addressed?

Mr. Hochman: Yes, sir. I assured counsel I would not object to the foundation.

However, as to its materiality, it is a letter from the State of California, Department of Employment, and the Government contends, your Honor, it has no materiality to the case of the Stockholders Publishing Company vs. the United States of America.

The Court: Let me see the document.

(The exhibit referred to was passed to the court.)

Mr. Binford: I was merely going to state the letter is not offered for the purpose of proving whether or not the parties are independent contractors or employees. That is the problem before the court.

It has pertinency for two reasons: the principal reason of course being that it is incumbent upon the plaintiff to show that we did not pay any tax to the State of California, unemployment tax, if we are entitled to credit under Section [33] 1601(b) of the Internal Revenue Code. That is the principal purpose of offering the letter.

(Testimony of Arthur G. Pollock.)

The Court: The objection is overruled. It is admitted in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Binford: Mr. Clerk, will you mark this Plaintiff's Exhibit 3 for identification, and hand it to the witness.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Binford): Mr. Pollock, I show you a letter from the Internal Revenue Department, dated February 14, 1945, and ask you to read it to yourself. A. (Examining exhibit.)

Mr. Binford: Your Honor, inasmuch as Mr. Hochman has agreed not to object on foundation, I will not try to lay a foundation but I now offer the letter in evidence as Plaintiffs' Exhibit 3.

Mr. Hochman: Your Honor, I object to that letter. Not only is it immaterial to the issues before this court, but further, your Honor, it is what we may term an intermediate letter in the sense that the final liability in which these taxes were assessed and paid are subsequent to that letter [34] and that intermediate letters by agents of the Government do not bind the Government. In addition it concerns a different matter.

For those two reasons the Government objects

(Testimony of Arthur G. Pollock.)

to the admissibility into evidence of Plaintiff's Exhibit No. 3 for identification purposes.

The Court: Overruled. Admitted.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Binford): You have testified and, as shown by the letter from the State of California, that you have paid no unemployment tax to the State of California on the dealers and route district men. Did the Stockholders Publishing Company ever receive any credit from the United States Government by reason of the fact that they were not required to pay any tax to the State of California?

Mr. Hochman: I object to that question, your Honor. It is outside of the pleadings. There is no allegations made in the pleadings, in the complaint, in the alternative for any credit.

Mr. Binford: We are not asking for credit in that respect.

Mr. Hochman: An issue has been made here, an offer of proof is being made here, outside I think of the purview, [35] even a broad purview, of the complaint.

The Court: I do not think so. They sued to get their whole money back and that is one of the grounds on which they say they are entitled to it.

Mr. Hochman: They didn't say, your Honor, in the complaint.

The Court: You do not have to spell out your whole legal theory in the complaint, according to

(Testimony of Arthur G. Pollock.)

the Ninth Circuit. According to me, before I was overruled by the Ninth Circuit, you did.

Mr. Hochman: Perhaps we will agree with the court later on.

Mr. Binford: Will you read the question to the witness, Mr. Reporter?

> (The question referred to was read by the reporter as follows: "Q. You have testified and as shown by the letter from the State of California, that you have paid no unemployment tax to the State of California on the dealers and route district men. Did the Stockholders Publishing Company ever receive any credit from the United States Government by reason of the fact that they were not required to pay any tax to the State of California?")

The Court: I think that that calls for his conclusion. [36] I think he can testify to whether he received any memorandum, notification, notice or anything of that nature indicating the United States has given that.

Q. (By Mr. Binford): Did you ever receive from the United States Government any memorandum or notice from the Government that you would be or were going to be given credit for any part of the tax which you paid?

Mr. Hochman: Your Honor, relative to the first part of this question as to the State of California and relative to the latter part the court has over-

(Testimony of Arthur G. Pollock.)

ruled the Government on this but could we have a continuing objection?

The Court: Yes, you may have a continuing objection to the entire line of questioning.

Mr. Hochman: Thank you.

The Witness: No.

Q. (By Mr. Binford): Getting back for a moment to the operation that you testified to this morning that the route district men and dealers, do some or any of them or all of them, have offices where they conduct their business?

A. I understand some do and some don't.

Q. As to those that do, does the Stockholders Publishing Company pay the rent for the offices?

A. No. [37]

Q. Are these men, or do these men, either dealers or route district men or both, occasionally hire helpers or assistants?

A. Well, I understand that they do.

Q. Does the Daily News or the Stockholders Publishing Company pay the salary of the assistants? A. No.

Q. In other words, they can hire assistants without your knowledge, I take it from your testimony?

A. Yes, that is true.

Q. Do you furnish any equipment to the route district men or dealers in order to aid them in their distribution of the newspapers?

A. Not as to the distribution. We do furnish racks.

Q. But you don't furnish things like automo-

(Testimony of Arthur G. Pollock.)

biles or other equipment? A. No.

Q. Some men have racks and some do not, that correct?

A. Your home delivery have no racks.

Q. Some of the route district men do have racks

A. Not the home delivery.

Q. But not the home delivery? A. No.

Q. Now if a man puts papers on the rack an some citizen [38] steals the paper, who loses th money?

A. Well, he still pays for the papers that wer billed to him.

Q. So he loses the money?

A. He loses the money.

The Court: In connection with the resale or dis tribution of the papers by the route district men o the dealers or the carriers, are they under you instructions or directions in any manner as to ho they shall conduct their sales?

The Witness: The thing that we stress is tha they are responsible for results.

The Court: I mean, do you tell them, "You g and canvass this block this week," or "Canvass tha block the next week"?

The Witness: No. We recommend.

The Court: Or do you tell them to go up an make a pitch that this is a lot better newspape than the Mirror, and so forth?

The Witness: Well, that may be given to ther in general as a suggestion. In other words, to fur nish promotion material.

(Testimony of Arthur G. Pollock.)

The Court: Yes?

The Witness: But they are not instructed to carry out any particular line of questioning nor promotion or sales talk, nor are they instructed to solicit any certain area at [39] any given time.

The Court: Very well.

Mr. Binford: You may examine, counsel.

Cross-Examination

By Mr. Hochman:

Q. Mr. Pollock, did you ever work in the circulation department, sir, in any capacity?

A. As circulation director?

Q. Yes. A. Yes, sir.

Mr. Hochman: Your Honor, if we may take this out of order, the Government has certain exhibits which it wishes to use and submit into evidence. There has been a stipulation between the parties relative to the foundation and I trust its materiality.

Mr. Binford: I stipulated to the foundation. I won't stipulate to the materiality, but certainly as to the foundation.

Mr. Hochman: May they be marked now, your Honor?

The Court: A, B, and C?

Mr. Hochman: A, B, and C.

The Clerk: Government's Exhibits A, B, and C for identification.

(Testimony of Arthur G. Pollock.)

Mr. Binford: May I suggest in marking them that you use the earliest date for the A and the next earliest, and [40] so forth?

Mr. Hochman: That has been done.

Mr. Binford: Thank you.

(The documents referred to were marked Defendants' Exhibits A, B, and C for identification respectively.)

Q. (By Mr. Hochman): Mr. Pollock, I show you Defendants' Exhibits A, B, and C for identification purposes and ask you, sir, to identify those for us, if you will.

A. These are three contracts between the Los Angeles Newspaper Guild and the Daily News.

Q. What are the dates covered?

A. A covers November 5, 1941, to November 4 1942; B covers March 29, 1943, to March 29, 1944 C covers November 27, 1944, to November 27, 1945

Q. Who are parties to those contracts?

A. The Los Angeles Newspaper Guild and the Daily News.

Q. Does the Guild represent the route district men?

A. Yes, they do. There is a letter right in the front of this Exhibit A.

Q. Is there the same letter in front of B and C sir?

A. I don't think that letter appears again.

Q. Then am I to understand that Plaintiff's Exhibit No. 1, which is in evidence, which is an agree

(Testimony of Arthur G. Pollock.)

ment between the Daily News, the Stockholders Publishing Company—— [41]

The Court: A?

Mr. Hochman: No, your Honor. There was an agreement.

The Court: Yes, Exhibit No. 1.

Mr. Hochman: Yes.

The Court: Very well.

Mr. Hochman: Strike that, Mr. Reporter.

Q. In effect, Mr. Pollock, is it not true that there are two agreements in which these route district men are involved?

Mr. Binford: Just a moment. I object to that as calling for a conclusion of the witness. He has already testified that the Newspaper Guild and the Daily News are parties to a collective bargaining agreement. We have in evidence a specific agreement between the Daily News and the various district men and dealers.

The Court: I understood his question to be as to whether or not there was not another agreement like Exhibit 1.

Mr. Hochman: No, your Honor. This has to do with whether or not——

The Court: The question is an argument with this witness as to whether that Exhibit 1 and Exhibit A are the same?

Mr. Hochman: No. I wish to know whether the men are governed—I wish to know in his capacity whether or not the men are covered by both contracts.

(Testimony of Arthur G. Pollock.)

Mr. Binford: That calls for a conclusion of th witness. [42]

The Court: Objection sustained.

The Witness: May I read——

The Court: No. The objection is sustained.

Q. (By Mr. Hochman): Mr. Pollock, does th Daily News or Stockholders Publishing Compar carry any insurance for newsboys, pay any mone for them? A. Sure.

Q. Relative to when newsboys deliver the Dai News, and if they are injured, are they covered b insurance, and if they are——

The Court: Which question do you want an swered? You have already asked three questior up to now and you are starting another one. Whic one are you going to ask him?

Q. (By Mr. Hochman): Are the boys covere by insurance?

A. Are you talking about the carrier boys?

Q. Yes.

A. As to the workman's compensation or othe insurance?

Q. Yes, sir.

A. I am not sure about workman's compensa tion. There is some kind of a carrier policy tha the premium, at least half of it if not all of it, paid by the district men or dealers, and whether c not they charge the carrier boy, I [43] do not know

Q. Does the Daily News or the Stockholder Publishing Company pay any of the amount?

(Testimony of Arthur G. Pollock.)

A. Well, that is what I said in the first place. I don't think they do.

Q. How about within the 10-mile zone?

The Court: Go ahead and finish your answer.

The Witness: Well, if they do I believe it is approximately half. But I don't think they do. I wouldn't like to be sure on that. I don't even know whether that was in effect in '44 and '45.

Q. (By Mr. Hochman): Mr. Pollock, suppose X was a district route man and he wished to increase the amount of money he was making could he go into a new section of town and begin a campaign for subscribers by himself?

A. No, he has to stay in the territory in which is assigned to him. If there was no business in that territory, but if it came under his general territory, he could. But he couldn't as an individual just go anywhere he so desired.

Q. I didn't have reference to anywhere that he so desired, I had reference to a territory where no one else was.

A. Well, the city is divided up so that all the territory is covered. Now I suppose he could go in there and solicit and get paid for new orders that his carriers make [44] through carrier prizes, or what have you, but he could not get the earnings from serving the subscribers outside of his own territory.

Q. Is it true that an area of a given man can be reduced by the company, Stockholders Publishing Company, whether or not the man wants it reduced?

(Testimony of Arthur G. Pollock.)

A. That can be done, yes.

Q. That can be done?

A. That can be done, either reduced or increase

Q. By action of the paper, is that correct?

A. Well, it is done by mutual agreement.

Q. That was not my question, sir.

Mr. Binford: He answered it by saying it wa by mutual agreement and not by the paper.

Mr. Hochman: Now, counsel, let me conduct th examination of the witness.

Q. I am not trying to trap you, Mr. Pollock, just want to know the legal power of the plaintif Can the plaintiff by itself without mutual consu tation with a given route district man or route dis trict dealer increase or decrease his district?

Mr. Binford: That calls for a conclusion of th witness, and I object to it.

The Court: Objection sustained. [45]

Q. (By Mr. Hochman): Did the company eve reduce a man's district without his consent?

A. Not without consultation.

Q. Does the Daily News have a general offic which the district men use in the company for pape work or whatever else they wish to carry on there?

The Court: You mean at their office?

Mr. Hochman: At their office.

The Witness: Not at this time.

Q. (By Mr. Hochman): Did they in 1943?

A. I believe they did.

Q. And '44 and '45?

A. That is the route district men.

(Testimony of Arthur G. Pollock.)

The Court: They had quarters?

The Witness: Yes.

The Court: Which they used?

The Witness: They had their desk space there and their files, whatever records was necessary.

Q. (By Mr. Hochman): Did they pay rent for this place? A. No.

Q. Mr. Pollock, relative to understanding the complete operation here, the newspaper sells the paper to the district [46] men who in turn sell it to the carriers, is that correct?

A. That is correct.

Q. Is it your testimony that the newspaper has nothing to do with the price that the district man charges the newspaper carrier?

A. Well, I believe I testified that there was a suggested price in there. The prices or the rates to the carrier boys are not all alike. There are many, or at least several, different rates.

Q. Isn't it true that in the past you have had complaints from parents of carrier boys relative to their boys, that is, relative to the parents' children's earnings, and thereafter the company adopted a more stringent control?

Mr. Binford: Just a moment. I object to that unless he nails it down to 1943, '44 and '45. If you will amend it to those years, I have no objection.

Mr. Hochman: So amended.

The Witness: I couldn't testify to those three years as apart from the others, but there have been complaints and that is one of the reasons why this

(Testimony of Arthur G. Pollock.)

suggested area of rates be, shall I say, put in effect or considered.

Q. (By Mr. Hochman): Can the Daily New fire a district man if it wishes to?

Mr. Binford: Just a moment. That is objected as [47] calling for a conclusion of the witness.

The Court: Sustained.

Mr. Hochman: The answer is in Plaintiff's Exhibit 1.

The Court: What is that?

Mr. Hochman: The answer to my own questio is in Plaintiff's Exhibit 1.

The Court: There is no question pending. that argument or are you just talking to yourself

Q. (By Mr. Hochman): Do the district men r ceive a minimum wage?

Mr. Binford: I object to the use of the wo "wage." If he asked if they received a minimu amount, I would have no objection.

The Court: Objection sustained. That is one the issues of law here and of fact. It calls for conclusion of the witness.

Mr. Hochman: The whole question, your Hono

The Court: Yes, did they receive a minimu wage.

Mr. Hochman: A minimum amount?

The Court: That is different.

The Witness: The route men do have a minimu guarantee.

Q. (By Mr. Hochman): Do the district rou men? A. That is right, city route men.

(Testimony of Arthur G. Pollock.)

Q. And your suburban route men? [48]

A. No.

Q. Do they receive vacations, the district men?

A. Yes.

Q. With pay? A. Yes.

Q. Has the Daily News, the Stockholders Publishing Company, been sued by anyone who was injured by a newsboy while delivering newspapers?

Mr. Binford: Objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove anything before this court at this time.

The Court: Objection sustained.

Mr. Hochman: May I make an offer?

The Court: It would not make any difference if you proved that they were sued. Anybody can sue anybody and it does not mean a thing.

Mr. Hochman: It is a preliminary question. I ask the court's indulgence on a preliminary question. Then I would like to know in terms of an offer of proof what happened.

The Court: What is your offer of proof?

Mr. Hochman: I don't know what the witness is going to answer, but I am interested in knowing whether or not the Daily News has acknowledged liability.

The Court: What do you offer to prove?

Mr. Hochman: That by acknowledging liability there is [49] a line.

The Court: No, what facts do you offer to prove?

(Testimony of Arthur G. Pollock.)

Mr. Hochman: Your Honor, I don't know wha the witness will answer, but I do know that th line of questioning, if either yes or no, will reve facts.

The Court: The objection is sustained unless yo have some proof which you can or are prepared t offer to show. Otherwise it is absolutely immateria

Mr. Hochman: I fail to see how the question immaterial. I think that liability by the plainti would show——

The Court: The objection is sustained.

Q. (By Mr. Hochman): Mr. Pollock, can th district men work for other newspaper publishin companies? A. And do the same work?

Q. Yes.

A. No, not in a competitive field.

Q. Do they have a minimum number of hou which they must work?

A. I believe they are excluded from hours unde the contract. Whatever provision is in the contra would govern.

Q. Which contract, sir?

A. This Exhibits A, B and C, the contract be tween the Guild and the paper.

I would like to say, if I may—maybe we ca clear [50] something up here—that for the purpos of the bargaining rights these men, city route me and dealers, are termed employees for bargainin purposes only under that contract.

Mr. Hochman: Your Honor, I move to strik that answer as not responsive.

(Testimony of Arthur G. Pollock.)

The Court: It may be stricken.

Do any of your dealers and route men also deal in the distribution of non-competitive newspapers or magazines?

The Witness: Not to my knowledge.

The Court: Do any of your dealers, for instance out of town, sell other newspapers?

The Witness: In some of the smaller areas or communities I believe they do. One dealer will handle more than one paper.

The Court: Do you know whether or not any of them solicit subscriptions to magazines, say of Collier's, the Cosmopolitan, Post, Police Gazette?

The Witness: No, I do not know whether they do or don't.

Q. (By Mr. Hochman): When a district man is unhappy with the situation, does he——

The Court: Counsel, you might just as well stop here. How does this witness know whether somebody is unhappy? Counsel is bound to object to it.

Mr. Hochman: I am assuming that fact, when he is unhappy, [51] and not if he is unhappy.

The Court: How does he know when he is unhappy?

Mr. Hochman: I haven't finished the question.

The Court: I think perhaps you had better start over again.

Mr. Hochman: With or without the "When"?

Q. Assuming, Mr. Pollock, that district man has a grievance, does he operate through the Guild or

(Testimony of Arthur G. Pollock.)

does he deal directly with someone in the new paper?

A. Well, assuming he has one he can do it eith way.

Q. Who is over these route men and distri men? A. Supervisors.

Q. What are their duties?

A. Well, the supervisorial capacity is to see th the results are obtained.

Q. Will you elucidate for us, please?

A. I couldn't say everything they do. Th supervisors are the men that the city route men ar dealers check with, transact business with, ar they are in turn under a circulation director wh is the man over all the circulation. If they need an thing or have anything to transact in any way the go to the supervisor or call him or come in.

Q. And these suggestions are made by the supe visors, promotional suggestions and things of th nature?

A. That is so, possibly from them or from th circulation [52] director.

Mr. Hochman: I have no further questions, you Honor.

The Court: Redirect?

Mr. Binford: I have no redirect.

The Court: Step down.

(Witness excused.)

The Court: Next witness.

Mr. Binford: Call Mr. Fahs.

F. B. FAHS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name in full, please?
The Witness: F. B. Fahs; F-a-h-s.
The Clerk: And your address?
The Witness: 12142 Bradfield Avenue, Lynwood.

Direct Examination

By Mr. Binford:

Q. Mr. Fahs, what is your business or occupation?

A. I am a dealer for the Los Angeles Daily News.

Q. And what area do you cover, roughly what geographical area?

A. I have the city of Lynwood, a portion of South Gate and a portion of Compton.

Q. When did you first become a dealer for the Daily News? [53] A. December, 1938.

Q. Now will you tell the Court how you operate your district and how you get your papers and how you get them distributed?

A. Well, I buy my papers from the Daily News. I am billed for the papers once a month. The bill is due on the 10th of the month. The papers in my case are delivered to me by truck at a corner in the city of Lynwood, and that is at the moment. In prior years they were distributed wherever the spots happen to be by mutual agreement with me and the

(Testimony of F. B. Fahs.)

Daily News. The truck spots them at one or per haps more specific places where I then pick ther up and further distribute them to corners or t carrier boys' homes.

Q. Do you do that in a car?

A. I do that in my own car.

Q. Does the Daily News pay for the car or th upkeep on the car? A. No, sir.

Q. Now you distribute these newspapers to th carrier boys. What kind of a deal do you have wit the carrier boys?

A. I charge the boys a rate per hundred copie to each of the boys. That rate may vary dependin on the difficulty of the route. But that rate is ar rived at, or rather when I engage a carrier, why have a discussion with the boy and his parents an it is arrived at that he will pay so much for [54 his papers per hundred copies, and I usually g further and say that if he has a daily average o 100 papers he will make approximately so muc money, because the difference between the whole sale rate that he pays me for the papers and th $1.60 retail price that he collects from the subscribe the difference between that will approximate s many cents per customer and 100 customers time that number of cents will give his earnings.

The Court: What is the $1.60?

The Witness: That is the retail price per mont for the Daily News home delivery.

Q. (By Mr. Binford): Now the carrier boy deliver to the subscribers and they collect from th

(Testimony of F. B. Fahs.)

subscribers, is that correct? A. Yes, sir.

Q. Supposing that they had somebody walk out on them and didn't pay their bill for the $1.60 a month, who loses that $1.60?

A. Theoretically the carrier boy loses it. I bill him for so many papers and he is billed for those papers and he pays for those papers.

As a matter of practical practice, I and many district men—I will speak for myself—will bonus, discount or give the boy a rebate for that move-out.

Q. In other words, so that you will absorb at least [55] possibly some of such loss yourself?

A. That is correct.

Q. Does the Daily News reimburse you for that loss? A. No, sir.

Q. Now do you have a helper, or have you ever had a helper on your route? A. Yes, sir.

Q. Did you hire him yourself?

A. Yes, sir.

Q. Did you pick him out yourself?

A. Yes, sir.

Q. Did you pay him a salary or wage?

A. I paid him a salary.

Q. And do you deduct social security for him?

A. I do.

Q. And does the Daily News reimburse you for the money you pay out for this salary?

A. No, sir.

The Court: Does the quantity of papers vary from day to day?

The Witness: It is at my discretion, sir.

(Testimony of F. B. Fahs.)

The Court: What do you do, phone in yo order every day?

The Witness: Well, I get the same order unless give them a different order. I order the number papers I want. [56] If I want the same number t morrow and the next day I won't call in and I w get the same number.

Q. (By Mr. Binford): Do you maintain yo office in your home or do you have a separate esta lishment? A. In my home.

The Court: Do you solicit new subscribers?

The Witness: I do, sir.

The Court: And the newsboys do, too?

The Witness: We do, yes.

The Court: When a customer to whom a paper delivered and when he pays, say he pays by chec does he make the check out to the boy or to you?

The Witness: I instruct my carriers in discu sion before their first collection period on ma points. The boys are dealing with quantities money for the first time. In so far as checks a concerned, I tell them to have those checks made o to the Daily News. I tell them not to make t checks out to themselves or to cash or to Mr. Fa but to the Daily News.

I have arrangements with my bank—the bo when they pay their bills turn those checks in wi the rest of their cash to me, all of which as far they are concerned is cash—and I have arrang ments with my bank to merely sign the Daily Ne

(Testimony of F. B. Fahs.)

and then I sign my name under it. If the check [57] bounces it comes back to me.

I tell the boys they should make them out to the Daily News because I don't want them bothering customers with checks or holding up checks that carriers might very well do.

I will take my chances, and if a check bounces I will follow it up whereas a boy would have difficulty in many respects.

The Court: Do you bill your customers or leave it up to the boy to do that?

The Witness: My wife writes the receipts. We hand the receipts to the carriers on the 25th of the month. They are made out with the name, the address, the amount that is due, and all the boy has to do is to see them and collect.

We have a green collection notice that we insert in the paper the day before the boy is to collect so the people are aware that he will be there. We do not bill them by mail or other than by a green collection notice.

The Court: And he takes the receipt back around and if they pay him the money he gives them a receipt?

The Witness: That is correct.

The Court: Which is already signed by you or your wife?

The Witness: No, he signs his own receipt. We merely, in order to have things correct, write the receipts and date them and the correct amount is on there.

(Testimony of F. B. Fahs.)

The Court: So if somebody pays him cash he ju
signs [58] his own name?

The Witness: That is correct. He is the c
lector. He is collecting for himself. Actually we a
doing part of his work.

The Court: I understand.

Q. (By Mr. Binford): The "we" is you a
your wife in that instance? A. That is rig

Q. Does the Daily News pay your wife anythin

A. I wish she were here.

The Court: The answer is no?

The Witness: The answer is no.

Q. (By Mr. Binford): Do you pay a self-e
ployment tax to the United States Government?

Mr. Hochman: I object, your Honor. It is i
material as to whether it is done or not.

The Court: Overruled.

The Witness: In the last three or four years
have.

Mr. Hochman: Your Honor, in 1943, '44 and '
there was no self-employment tax.

Mr. Binford: Also the testimony has been th
the operation is substantially the same today as
was in that time.

The Court: Yes.

Mr. Hochman: On cross-examination I w
limited to '43, [59] '44 and '45. even though t
operation was substantially the same. I feel th
counsel should also be limited as I was limited.

The Court: No, I think there was one questi

(Testimony of F. B. Fahs.)

there that I sustained an objection to because yours was a shotgun question. The objection is overruled.

Q. (By Mr. Binford): I show you here a form furnished by the United States Government for 1953 and ask you if that is the type of form that you filled out accompanying your 1953 income tax?

A. Assuming I paid it?

Q. Assuming you paid it.

A. Yes, I used that.

Mr. Binford: I offer this profit or loss from business or profession Schedule C under Form 1040 for 1953 as Plaintiff's exhibit next in order.

Mr. Hochman: Your Honor, I object on the grounds heretofore mentioned.

The Court: Overruled. It is admitted.

The Clerk: Plaintiff's Exhibit No. 4.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No 4.)

Q. (By Mr. Binford): Does the Daily News deduct from or bill you, inasmuch as they pay you no money, does the Daily News pay you or [60] bill you for social security? A. No, sir.

Q. Does the Daily News bill you for withholding or income tax? A. No, sir.

Q. Or State unemployment tax?

A. No, sir.

Mr. Hochman: Your Honor, I object to this in terms of a continuing objection to this line of questioning, as to its materiality.

The Court: Overruled.

(Testimony of F. B. Fahs.)

Q. (By Mr. Binford): If you draw too mar papers on a given day——

The Court: "Too many" meaning more tha he can sell?

Q. (By Mr. Binford): ——more than you ca sell, and you have, say, ten papers left over on a da does the Daily News give you credit if you retur those papers? A. No, sir.

Q. They are a loss to you for whatever you pa for them?

A. Assuming I have ordered so many, X numb of papers, I pay for them whether I sell them o not. If they send me extra copies by error I ca return them.

Q. But if they fill your order and you hav ordered [61] too many it is your loss?

A. Correct.

Mr. Binford: You may examine, counsel.

Cross-Examination

By Mr. Hochman:

Q. Mr. Fahs, does the Daily News know ho much your boys, your carriers, pay for the papers

The Court: Does he know what?

Q. (By Mr. Hochman): What your carri boys pay for papers.

A. May I qualify my answer on that?

Q. Certainly.

A. Perhaps a year ago I was asked to make ou a list of, if I recall this correctly, a list of wha

(Testimony of F. B. Fahs.)

each boy made, what he was charged for his papers, the difference as routes differed in rates. But I believe that was the first time I ever submitted such a list to the Daily News. They had never asked me or told me other than by suggestion that a boy should earn approximately so much. They had never asked me to submit a list of my rates, no.

Q. How long have you been working for the company, sir?

The Court: Working for what company? I thought that is what I was going to have to decide, whether or not he ever worked for them. [62]

Q. (By Mr. Hochman): How long have you had an association with them?

A. I have been a dealer for the Daily News since 1938.

Q. Mr. Fahs, can you be fired for any reason?

Mr. Binford: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. (By Mr. Hochman): Is there anyone over you who is associated with the Stockholders Publishing Company?

A. I have supervisors, and there is a circulation manager.

Q. What type of supervision occurred. Relate it as well as you can to 1943, '44 and '45.

The Court: Do you understand the question?

The Witness: Yes, sir. I hesitate because, as far as I am concerned, the supervision is the same now as it was when I went to work for them. But as far

(Testimony of F. B. Fahs.)

as '43, '44 and '45 is concerned, I was in the Arm in those years.

Mr. Hochman: I move to strike all of this ev dence, your Honor. This is an incompetent witnes

Mr. Binford: He testified a number of times tha his operation was the same prior to 1943 and up t the present time. He said it has been always abou the same operation. Mr. Pollock also said the sam thing, that the operation has [63] always been sub stantially the same.

The Court: I think the only issue here is whethe it was '43, '44 and '45.

Did your wife run the business while you wer gone?

The Witness: No, sir, I was in the Army and left in December of '42.

The Court: And returned when?

The Witness: In February of '46.

The Court: I do not think his testimony is ma terial.

Mr. Binford: Other than the statement that th witness made that his operation was the same prio to the time when he went away than it is at th present time. I recognize the position that he wasn here during the three years while he was in th Army. His operation was the same when he left an the same when he came back. It is a reasonable as sumption that the Daily News' operation continue the same in the interim, with the testimony of Mr Pollock who has testified that it has always bee the same.

(Testimony of F. B. Fahs.)

The Court: His testimony coupled with that of Mr. Pollock that it has always been the same as to what has occurred since may be admissible for such inferences as may be drawn, but certainly it is not direct testimony as to '43, '44 and '45. So it will go to the weight of his testimony and not to its admissibility, so your motion to strike is denied. [64]

Have you finished your cross-examination?

Mr. Hochman: No, your Honor. There is a question pending.

The Court: Is there?

Mr. Hochman: Yes, your Honor.

The Court: He said he did not know, that he was in the Army in '43, '44 and '45. That was his answer to your question.

Mr. Hochman: Your Honor, I asked the question before relative to whether or not there were complaints received. The answer given me was assuming business was going on as it has been all along to Mr. Pollock relative to complaints by newspaper carriers' parents, I was told I couldn't pinpoint it, that it wasn't admissible.

The Court: What is the unanswered question here?

Mr. Hochman: I asked what type of supervision occurred.

The Witness: I answered you.

The Court: In '43, '44 and '45, and he said he was not there in '43, '44 and '45. Now you want your question answered as to what type of supervision since, and before?

(Testimony of F. B. Fahs.)

Gate, Lynwood, North Long Beach—[67] everything south of the Firestone plant. Dad worked 15 years and then Dad died all of a sudden. Nobody else wanted it, so I went to the Daily News and told them I would like to have it, and nobody wanted it after a week and they said, "Fahs, you can take it." So I have been with them ever since. That is how I got it.

The boundary was there. I took over my dad's rate for the papers. The files were at his home. That was prior to my affiliation with the Newspaper Guild. It isn't handled that way now, but that is the way I got it. Nobody else wanted it.

Mr. Hochman: No further questions.

The Court: Step down.

(Witness excused.)

The Court: We will have the afternoon recess.

(Short recess.)

Mr. Hochman: Your Honor, at this time I would like to renew a motion to strike the testimony of Mr. Fahs on the grounds that he wasn't present in the years in question.

The Court: The motion is denied.

Next witness.

Mr. Binford: I will call Mr. C. D. Melton.

C. D. MELTON

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows: [68]

The Clerk: State your name in full?
The Witness: C. D. Melton.
The Clerk: M-e-l-t-o-n?
The Witness: Right.
The Clerk: Your address?
The Witness: 615 Eaton Drive, Pasadena 8.

Direct Examination

By Mr. Binford:

Q. Mr. Melton, what is your business or occupation?

A. I am a wholesale distributor of newspapers for the Daily News.

Q. What area, general geographic area, do you operate in?

A. East Los Angeles, part of Montebello, part of Monterey Park.

Q. Will you tell us how you conduct your operation, where do you get your papers, what do you do with them when you get them, and so forth?

A. Well, my papers are spotted by truck and I pick them up in the morning and take them to the homes of the carriers who distribute them to the subscribers.

Q. Are you billed for those papers by the Daily News? A. Yes, sir.

Q. You have a deposit up with the Daily News

(Testimony of C. D. Melton.)

of some sort? [69] A. Yes, sir.

Q. And you sell them to the carrier boys?

A. Yes, sir.

Q. Now the carrier boys deliver then to the ultimate consumer or subscriber. Do they send out the billings themselves, the carrier boys?

A. No. I make the bills out and furnish them to the boys and they make the collections and pay their bill.

The Court: To whom is the bill sold to subscribers indebted, to you?

The Witness: No, the carrier is in business for himself. I only make out a bill with the address and the name and the date that the subscriber owes for and the amount, and turn it back over to the carrier.

The Court: What is it, a receipt book?

The Witness: A receipt book.

The Court: So he just signs the receipt?

The Witness: He either signs it if the people insist, some of them sign it, and once it is torn out, it is in a duplicate form, the boy keeps a yellow slip in his book which says "This is not a receipt," and he gives the original to the customer.

Q. (By Mr. Binford): If there is a move-out, who stands the loss?

A. Well, the boy understands when he takes the territory [70] that he stands all losses, but I absorb some of it through bonuses. I always mail a bill to the people. All losses, practically all, are move-outs, and if I can't find out from the neighbors where they moved to or collect it for him, or have

(Testimony of C. D. Melton.)

another district man who is in that part of town, then I mail the bill and give the boy credit at least for the amount of the papers, the cost of those papers.

Q. So he won't take quite as much of a loss?

A. Yes, sir.

The Court: Then if you ultimately collect the bill he gets the credit?

The Witness: He gets the rest of it.

Q. (By Mr. Binford): Now if you order more papers than you need on a given date, does the Daily News give you credit for returned papers?

A. No, sir. If I want to change up or down I call it in every day and if I don't then there is extra papers and I pay for whatever comes out on the truck every morning.

Q. Do you hire a helper or have you hired a helper from time to time?

A. I have at different times, yes, sir.

Q. Incidentally, when did you first become a route district man for the Daily News?

A. I started with the old Record in January, 1933. [71]

Q. And you came with the Daily News when the Daily News took over the Record, is that correct? A. Yes, sir.

Q. Do you remember what year that was?

A. Around in the spring I believe of '34 or '35.

Q. '34 or '35? A. Yes.

Q. Do you have an office or did you have an office?

(Testimony of C. D. Melton.)

The Court: You have been with them continuously?

The Witness: Yes, sir.

Q. (By Mr. Binford): During 1943, '44 and '45? A. That is right.

The Court: Your practice has always been the same as you have described here?

The Witness: I don't think there has been any difference whatsoever in the 21 years I have been there in the operation, at least during '43, '44 and '45 and up to today it has been practically identical.

Q. (By Mr. Binford): You say you have hired helpers in the past. Did you pay their salaries or wages?

A. Salary or commission, whatever it happened to be.

Q. Did the Daily News reimburse you for whatever you paid them? [72] A. No, sir, never.

Q. Do you maintain an office in your home or do you have a separate office?

A. Well, I have both. I have always had an office in my home.

The Court: Then you have a separate office, too?

The Witness: Yes, sir.

Q. (By Mr. Binford): Does the Daily News pay any rent to you for your separate office?

A. No, sir.

Q. Does the Daily News pay the rent to you for your office in your home? A. No, sir.

Q. When you get your bill at the end of the month from the Daily News, are you also billed for

Testimony of C. D. Melton.)

cial security? A. No, sir.

Q. Are you billed for State Unemployment In-rance? A. No, sir.

Mr. Hochman: I object to these questions.

The Court: Overruled.

Mr. Hochman: May I have a continuing objec-on?

The Court: It may extend to all this line of estioning.

Mr. Hochman: Thank you. [73]

Q. (By Mr. Binford): Are you billed for ederal income tax? A. No, sir.

The Court: You mean by the Daily News?

Mr. Binford: By the Daily News.

The Witness: No, sir.

Q. (By Mr. Binford): Now, for the past veral years have you paid a self-employment cial security tax?

A. The last three years, I believe, three or four. just can't remember. Since it became law.

Mr. Binford: May I have Plaintiff's Exhibit 4?

(The exhibit referred to was passed to counsel.)

Q. (By Mr. Binford): I show you Plaintiff's xhibit 4——

Mr. Hochman: Your Honor, may the continuing jection be to this also?

The Court: It will go to the whole line of ques-oning and it may be deemed to be so made on the ound it is immaterial, and it is overruled.

(Testimony of C. D. Melton.)

Mr. Hochman: Thank you.

The Court: Is that the form you used?

The Witness (Examining exhibit): Yes, sir, this is the form.

The Court: Anything else? [74]

Mr. Binford: I have no further questions, your Honor.

The Court: Cross-examine.

Cross-Examination

By Mr. Hochman:

Q. Mr. Melton, you mentioned that the newspaper boy, the carrier, was "in business for himself," is that correct? A. Yes, sir.

Q. Are you in business the same way, sir?

A. On a commission basis, yes sir.

Mr. Hochman: I have no further questions.

The Court: What do you mean, a commission basis?

The Witness: The amount of money I make is the difference between the rate that the Daily News bills me for the papers and the amount that I bill and collect from the carrier boys.

The Court: Does the Daily News determine what you shall bill and collect from the carrier boys?

The Witness: They never have since I have been there ever said, "You make the rate so-and-so."

The Court: Do you fix those rates by negotiation with the boys?

The Witness: By negotiation with the boys.

(Testimony of C. D. Melton.)

The Court: Are they all the same or is there some difference?

The Witness: No, sir, they vary in different parts of [75] town, and even in the district I have now, due to the amount of saturation in a certain neighborhood, a boy who delivers a hundred naturally in the same space another boy would deliver 40 or 50.

The Court: You have a lot of hilly country in your neighborhood?

The Witness: Yes, sir.

The Court: The rate is different there than where it is level?

The Witness: Yes, sir.

The Court: Do any of your boys have to have cars?

The Witness: No, sir, I don't have any.

The Court: Very well.

Any redirect?

Redirect Examination

By Mr. Binford:

Q. Do you use a car in your business?

A. Yes, sir.

Q. To distribute the newspapers to your carrier boys? A. Yes, sir.

Q. Does the Daily News pay for any of the expense of that car? A. No, sir.

Mr. Binford: I have no further questions.

The Court: Step down. [76]

(Witness excused.)

The Court: Are the rest of your witnesses all cumulative?

Mr. Binford: They are all cumulative, your Honor, and I have a number of them. It will be virtually the same testimony from each witness in different language.

The Court: Do you have the names of them?

Mr. Binford: Yes, I do.

The Court: Would you be agreeable to stipulating if these parties are identified?

Mr. Hochman: Your Honor, I had planned on calling two witnesses, one of which happens to be in the courtroom under subpoena.

The Court: No, I mean about the rest of his witnesses. What I am trying to get at now is this stipulation about his additional witnesses, if they are all just cumulative.

Mr. Hochman: I would like one more and then I can save the Government subpoena money. In other words, we have subpoenaed the same man.

Mr. Binford: You can call your man.

The Court: What I am trying to get over is this, in five minutes he can rest his case, can you not?

Mr. Binford: I can, your Honor.

The Court: Then the witnesses are still here and you can call them yourself. [77]

Offer your stipulation and let us see, that is so-and-so were called and testified his answers to the same questions would be substantially the same as that given by the two previous witnesses.

Mr. Binford: I will offer this stipulation: If red Hummel, Harry Waters and Glenn Murray ere called their testimony would be substantially ıe same as the testimony of the two previous witesses.

The Court: The difference being in their routes ıd their carriers?

Mr. Binford: That is correct.

The Court: Do you accept the stipulation?

Mr. Hochman: I will accept the stipulation.

The Court: Very well. Does the plaintiff rest?

Mr. Binford: The plaintiff rests, your Honor.

Mr. Hochman: Your Honor, the Government ffers Defendants' Exhibits A, B and C for identiıation purposes in evidence.

The Court: Admitted.

(The documents referred to were received in evidence and marked Defendants' Exhibits A, B and C.)

Mr. Hochman: Call Mr. Mahdesian, please. [78]

SAMUEL G. MAHDESIAN

lled as a witness by and on behalf of the defendıts, having been first duly sworn, was examined ıd testified as follows:

The Clerk: State your name in full, please?

The Witness: Samuel G. Mahdesian; M-a-h-e-s-i-a-n.

The Clerk: And your address?

The Witness: 516 South Alexandria, Los Anıles 5.

(Testimony of Samuel G. Mahdesian.)

Mr. Hochman: May it please the court, before we continue with this witness, lest the stipulation preclude something, let me state that I should wish the court to within the framework of that stipulation reflect that the continuing objection made heretofore relative to the two previous witnesses who did testify be continued over covering the three in the stipulation.

The Court: Yes. The intention was that if they were called the same questions would be asked and their answers would be substantially the same and that it would be subject to all the objections and rulings which the court made on the two previous witnesses.

Mr. Hochman: Thank you.

Mr. Binford: So stipulated.

Direct Examination

By Mr. Hochman:

Q. Mr. Mahdesian, what is your occupation, sir?

A. I am district route manager of the Daily News. [79]

Q. How long have you been so employed, sir?

A. Since May 20, 1924.

The Court: You are a district route manager, is that right?

The Witness: Well, yes, that is the term I use.

The Court: Is there some difference between a district route manager and a district route man, or route district man?

Testimony of Samuel G. Mahdesian.)

The Witness: It is the same thing, taking care of a certain area.

The Court: You have an area?

The Witness: That is right.

The Court: In other words, you are not employed at the Daily News Office?

The Witness: No.

The Court: As manager of all of their district route men?

The Witness: No.

The Court: You are a manager of a district route?

The Witness: That is right.

Q. (By Mr. Hochman): Were you so employed in 1943, '44 and '45? A. I was.

Q. Confining your testimony as near as you can to those years, Mr. Mahdesian, did you at that time have a desk [80] or desk space in the Daily News Building? A. I did.

Q. Did you pay rent for that space, sir?

A. I did not.

The Court: What is your territory?

The Witness: At that time in '42 I had the Southeast section of Los Angeles from Pico to Manchester, Main to Alameda.

In 1944 and '45 I had the area known as Leimert Park, Baldwin Hills and View Park.

At the present my area that I have is known as Sorro Vista, to be exact the boundaries are from Pico to Florence and from Overland to Walgrove.

Q. (By Mr. Hochman): Mr. Mahdesian, to

(Testimony of Samuel G. Mahdesian.)

your knowledge was there any complaints by parents of carrier boys relative to the amount of money their sons were receiving for performing these tasks?

A. Not in my particular case, but I have heard of men who have had difficulties.

Mr. Binford: Move to strike the latter part as it is not within the knowledge of the witness.

The Court: It may be stricken.

Q. (By Mr. Hochman): Mr. Mahdesian, does the Daily News know how much you are charging your boys for papers? [81] A. Yes.

The Court: What is your question, at the present time?

Mr. Hochman: At that time.

The Court: In '43, '44 and '45?

Mr. Hochman: Yes. I have asked the witness to confine his testimony to those dates.

The Court: Very well.

Q. (By Mr. Hochman): Under what type of operation were you associated with the paper? To clarify the question, Mr. Mahdesian, if difficulties arose was there any supervision of you? In your own words, could you describe your association?

Mr. Binford: Just a moment. I will object to that as vague and inconclusive. I wouldn't know how to answer such a question. If counsel will specify what he wants, I am sure the witness can answer it. Objected to as being vague and indefinite.

The Court: I think it ought to be more specific.

What you are getting at, do you make the decisions in connection with your business?

(Testimony of Samuel G. Mahdesian.)

The Witness: I do make the decisions but I have found in my experience of letters being benefited by the counsel and advice of those that are associated with the paper.

The Court: Do the supervisors of route men at the paper, direct you in any decision that you shall make, direct you [82] to make a specific decision or do they suggest it?

The Witness: They have not—if I may answer —they have not imposed, but I have often solicited their suggestions and counsel.

The Court: What I am getting at is, do they call you up and say, do so-and-so?

The Witness: No, they have not done that, but they have called me and imparted information that Mr. Jones called and said that the window was broken and wants to see you at once, or they have missed their paper, to that extent impart information as to what has happened.

Q. (By Mr. Hochman): Have you attended meetings where different route men would get together with, say, the circulation manager or the supervisors? A. Yes.

Q. At any of those meetings were suggestions made?

Mr. Binford: Just a moment. I will object to that as no proper foundation laid. If we can get the time, place and who was present I will withdraw my objection.

Mr. Hochman: Your Honor, I have asked the

(Testimony of Samuel G. Mahdesian.)

witness to confine the testimony to the best of his ability to '43, '44 and '45.

The Court: Very well.

Mr. Hochman: We are not trying to impeach this man, we [83] are trying to get information.

The Court: You want it for those years and your question is whether or not he attended meetings attended by route men and supervisors where any suggestions were made?

Mr. Hochman: Suggestions, yes. That word has been bandied about and I want to know if it has a definite meaning.

The Witness: I have been at meetings but I cannot say that they were in those years, but probably they could be in those three years, yes.

The Court: What were they, promotional suggestions?

The Witness: Yes, pep talks and, for instance, a new feature was coming to the paper and they would call and tell us beforehand to be on our toes, that Drew Pearson is going to be a columnist, that Eleanor Rossevelt is going to write a column, and we are going to put out circulars and when those subscriptions come in do your best not to antagonize them and give them good service when they subscribe—in that trend.

Q. (By Mr. Hochman): Now you mentioned, Mr. Mahdesian, that in 1943 you had one district and in 1944 you had another, is that correct?

A. Yes.

Q. How did that change occur?

Testimony of Samuel G. Mahdesian.)

A. Well, for about seven years—from 1924 to 942 I [84] had the southeast, which had a nick-ame of "Modern Africa," and I was kind of fed o with it, and I went and told the office that I am aving quite a bit of trouble—when I say "trouble." e collections were hard, and so forth—and I had een there quite a long time, and if I got a better strict I would stay, otherwise I would look around r another job. And I was given a district that pened on the west side.

The Court: That was the Leimert district?

The Witness: Yes.

The Court: And then how did you shift to the her one? You saw a new subdivision coming up?

The Witness: When the paper changed from the fternoon to the morning, and as the Guild had al-ady entered into the picture, the picture was anged and whenever areas were opened up then ur seniority came into effect where we could ave——

The Court: The choice?

The Witness: ——the choice of choosing, and I ose Morro Vista.

The Court: I see.

Q. (By Mr. Hochman): Can you enlarge your strict by yourself, sir?

A. The boundaries or the circulation?

Q. The boundaries. A. No. [85]

The Court: You signed a contract with them?

The Witness: That is right.

The Court: By the way, I wonder if I might in-uire of Mr. Fahs and Mr. Melton and the other

(Testimony of Samuel G. Mahdesian.)

man if they signed the same contract as Exhibit 1?

Mr. Binford: Mr. Melton and Mr. Fahs are here.

And you each signed the contract?

Mr. Melton: Yes.

Mr. Fahs: The dealer agreement?

Mr. Binford: The dealer agreement.

Mr. Fahs: Yes.

The Court: Both of them?

Mr. Binford: Both of them.

The Court: Is that included in your offer?

Mr. Binford: That is included in my offer.

The Court: Do you accept that, Mr. Hochman?

Mr. Hochman: Yes, certainly.

The Court: Very well.

Q. (By Mr. Hochman): Mr. Mahdesian, have you ever been interrogated relative to what you do?

The Court: By whom, where, when? By the McCarthy Committee or by whom? You ask if he has ever been interrogated.

Mr. Hochman: Your Honor, so far the witness has had no trouble with my questions. [86]

The Court: That does not make any difference, I am supposed to be the one who has to decide the matter. If the question and the answer does not make any sense to me, why ask them?

Mr. Hochman: I appreciate that.

Q. Relative to 1943, '44 and '45.

The Court: By whom?

Mr. Hochman: In those years.

The Court: By whom? What difference does it

Testimony of Samuel G. Mahdesian.)

ake? Suppose his wife asked him what he does or
e meets someone and she interrogates him?

Mr. Hochman: Your Honor, we have the contracts
ere in which case the written documents speak for
emselves. We pursue oral testimony in some way
cover any ambiguity which may be present. To
nderstand what these men are we have to know
hat they think of themselves.

The Court: I appreciate your philosophical dis-
rtation on the purpose of a lawsuit, counsel——

Mr. Hochman: Not on the purpose of the law-
it, but the purpose of the question of what this
an considers himself.

The Court: The question is wholly unintelligible
nd it is immaterial whether he has been interro-
ted unless you relate it to something about some
ficial money or something and the time and the
ace. [87]

Q. (By Mr. Hochman): Mr. Mahdesian, have
ou ever described what you do to a friend who has
quired of you in 1943, '44 or '45?

Mr. Binford: I will object to that as incompe-
nt, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Hochman: I will make an offer of proof,
our Honor. May I make my offer?

The Court: From what you have said it sounds
ke you are laying ground for impeachment.

Mr. Hochman: Not of this witness, your Honor.

The Court: And the way to lay the ground for im-
eachment—and besides, a friend, that is too indefi-
te and uncertain.

(Testimony of Samuel G. Mahdesian.)

The objection is sustained.

Mr. Hochman: May I make my offer?

The Court: Your offer of proof is immaterial. This has absolutely no date, person, time or anything else involved. If you can relate it to some specific person and a specific date, then it will mean something in the lawsuit. But whether or not he ever described what he did to a friend in 1943, '44 or '45 is wholly immaterial. Maybe he was kidding his friend, I do not know.

Mr. Hochman: You determine that on cross-examination.

The Court: What are you trying to prove? [88]

Mr. Hochman: I can't testify, your Honor.

The Court: I am asking you, what are you trying to prove?

Mr. Hochman: I will say that he considered that he was working for the Daily News.

The Court: Are you trying to prove that on such-and-such a date he told somebody, naming him, that he was working for the Daily news, is that it?

Mr. Hochman: I am not sure of the exact year, I am sure of the conversations.

The Court: With a person?

Mr. Hochman: With people.

The Court: Identify your person and ask him whether or not he did say such-and-such a thing to them on or about that date.

Mr. Hochman: My information, your Honor, as related by the witness is that when asked from time to time by people, what does he do, he replies, "I

Testimony of Samuel G. Mahdesian.)

ork for the Daily News." Now that has been going
n, according to the witness and according to what
ie witness has said, through the years. I think it is
ithin his purview if he had no trouble with the
uestion to answer it subject to good cross-examina-
on perhaps.

Mr. Binford: That is a conclusion of the witness
the best, your Honor. [89]

The Court: It is not a proper impeachment
uestion.

Mr. Hochman: I don't mean to impeach him; I
n trying to show how this witness considers what
e has been doing for the past 30 years.

The Court: That is wholly immaterial.

Mr. Hochman: No further questions.

The Court: Also a conclusion of the witness.

Mr. Hochman: That is all.

The Court: Step down.

Do you have any cross-examination?

Mr. Binford: No questions.

The Court: By the way, do you have a contract
milar to Exhibit 1?

The Witness: Yes.

The Court: You have operated under the terms
the contract like that at all times?

The Witness: Yes, sir.

The Court: Do you pay your boys different
tes?

The Witness: Yes, sir.

The Court: And they get a different rate of pur-
ase from you?

(Testimony of Samuel G. Mahdesian.)

The Witness: Yes.

Q. (By Mr. Hochman): Mr. Mahdesian, do you also operate under the collective bargaining agreement of the Guild? [90]

Mr. Binford: Just a moment. That calls for a conclusion of this witness. He is not a party to that contract.

Mr. Hochman: He is a beneficiary.

The Court: Objection sustained.

Do your carriers belong to the union?

The Witness: No.

The Court: Do you maintain an office?

The Witness: Yes, sir.

The Court: Outside of your home?

The Witness: Yes, sir.

The Court: Does the Daily News pay the expense of it?

The Witness: No, sir.

The Court: Or reimburse you for it?

The Witness: No, sir.

The Court: Your relation with the Daily News in so far as the paper is concerned is that you buy papers from them and pay them, is that right?

The Witness: Yes, sir.

The Court: And then sell the papers?

The Witness: Yes, sir.

The Court: Any questions?

Mr. Binford: No questions.

The Court: Step down.

(Witness excused.)

The Court: Next witness. [91]

Mr. Hochman: Let me see.

The Court: You do not know whether you will ave another witness or not?

Mr. Hochman: I think we can waive him, your Honor. It would probably be cumulative.

The Court: You mean you want to rest now?

Mr. Hochman: Yes, your Honor.

The Court: The Government rests?

Mr. Hochman: Yes.

Mr. Binford: The plaintiff rests.

The Court: Very well.

Do you want to argue the matter?

Mr. Binford: If your Honor would like to hear rgument I will be happy to argue the case or I ould be glad to submit it on written argument, hichever your Honor would prefer.

The Court: If it can be decided on a question of act, which it can, and to me it is a very simple mat- r, but if it comes into a question as to whether or ot the Stockholders Publishing Company was en- tled to deductions according to that impossibly orded Section 1601(b), whatever it is, that is an- ther matter. As far as the question of fact is con- rned, I do not think that there is any doubt but hat these people are independent contractors.

Mr. Hochman: Has your Honor looked at those ollective [92] bargaining agreements?

The Court: Yes, I did.

Mr. Hochman: Could I cite your Honor to sev- ral parts of them?

The Court: I think they are pretty well cleared up here by this letter.

Mr. Hochman: That letter is not in front of the 1945 contract, which is now Defendants' Exhibit C.

The Court: It is for the purpose of terminology only. It is in the '42; I do not think there is anything in '43.

Exhibit C, you say?

Mr. Hochman: Yes, your Honor, Section 14. That will be the 1945 contract, Section 14.

The Court: Yes?

Mr. Hochman: Subsection 2.

The Court: Section 14 reads:

> "No district man shall be required to do the work of a truckdriver, and no truck driver shall be required to do the work of a district man."

Is that it?

Mr. Hochman: No, your Honor. This is the collective bargaining agreement by the Guild. Mr. Pollock testified that they operate under the Guild. Sections 18 to 22 specifically cover them, and Section 14.

Now when you choose a job classification, when they [93] want to choose they decided it in terms of underlying and specific information for perhaps later arbitration disputes, what do they go and choose? They say a truckdriver can say he has been a truckdriver but he can't be a route district man and a route district man can't be a truckdriver. Do you think, your Honor, that it is reasonable to assume that they were making the comparison between an independent contractor and an employee or were

ıey rather trying to show an employee with a cer-
ain job classification cannot do the work of another
mployee with another job classification? This was
ıtered into by the Stockholders Publishing Com-
any with the Guild. It is rather interesting that
ıey chose that terminology.

The Court: Where is a district man defined in
ıis contract?

Mr. Hochman: In Section 22, your Honor, Sub-
ections 3 and 4.

That calls them route district men. Are they the
ıme as district men?

Mr. Hochman: Yes, your Honor.

Mr. Binford: While it is not in evidence, there
re such things as salaried district men, too. They
re not concerned in this proceeding in any way, but
ıere are district men who are on salary.

Mr. Hochman: The Government doesn't have the
ırden to [94] show that. I asked my question of
ıe witnesses as route district men.

The Court: I think you are wasting your time,
ounsel.

Mr. Hochman: I believe so, but I want the rec-
rd to reflect it.

The Court: There is no doubt in my mind but
vhat, as a question of fact, they are independent
ontractors.

Mr. Hochman: Mr. Fahs testified his father had
he route and yet he had to gain it and apply for it
ı the same manner as a stranger would. In other
vords, there is no three ways of delivering a news-
aper.

The Court: Suppose you want to be a dealer for Cadillac automobiles. Do you not have to go and make a deal with the Cadillac people?

Mr. Hochman: Yes, your Honor. But there is no three ways of delivering a newspaper.

The Court: You just cannot go out and start selling Cadillacs. And when you make your deal with them do they not give you a certain district or area, and is that not true in every kind of merchandising business?

Mr. Hochman: Yes, your Honor, but in their own contract, Plaintiff's Exhibit 1 that is in evidence, if your Honor cares to read it——

The Court: I did read it.

Mr. Hochman: It states that these men may be fired at [95] any time for any reason. Now, then, when you have a situation where a man may be fired——

The Court: It says that they may terminate the contract. It has terms in it whereby the Daily News can terminate, and it has terms in it whereby the other people can terminate.

Mr. Hochman: There is mutuality, your Honor, they can both leave each other. But if you want the position and your—I shall use the word "your employer"—or the man you are associated with can terminate your employment at any time, then, your Honor, I humbly suggest that a suggestion coming from that man's employee, namely, a supervisor, carries with it a lot more weight than Webster normally gives to a "suggestion."

The Court: I think that is probably true, but

the test of whether a person is an independent contractor or an employee is whether or not the person having the relationship with him, that is to say, ordinarily an employer, controls him in his means and method of doing his work or whether he only controls the result.

Mr. Hochman: If it please the court, there are no three ways of delivering a newspaper. It is almost an abecedarian. You either hire a man to paint your house or you hire a contract painter. If you hire the man to paint your house you pay him so much an hour and so much a day, but you don't [96] stand beside him and guide his hand. You are hiring a painter.

Here, too, there is no difficulty attached in the sense of delivering these newspapers. There is no discretion, there are no two or three ways. The Daily News covers the promotional activity. Mr. Mahdesian pointed out that they tell him which columnist to boom, that Eleanor Roosevelt or Drew Pearson is going to do something. They can fire them. They run their own promotional campaign. Mr. Fahs says that they set the prices.

The Court: That does not make them employees. It is just general knowledge that a manufacturer, for instance, will put on all kinds of promotional advertising but he still sells beer to the corner groceryman who is an independent contractor and he sells it to him in any way that he can. But because the brewery might put on some singing commercial or put billboards all over a state or put out newspaper advertising, that does not make an employee.

Mr. Hochman: Taking that one isolated example, your Honor is correct, but put them all together and you get a situation that does not bespeak an independent contractor. There is no independence to this contracting relationship.

The Court: I am sorry, counsel, but I cannot agree with you.

I do not think it is necessary to determine these other questions of law in view of the fact that it turns upon this [97] point of fact, and the plaintiff will have judgment, and will also prepared findings of fact and conclusions of law.

(Whereupon, at 4:10 o'clock p.m., court was adjourned.) [98]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 29th day of July, A.D. 1954.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed February 4, 1955. [99]

Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 54, inclusive, contain full, true and correct copies of Complaint in case 11879-PH; Answer in case 11879-PH; Complaint in case 14627-PH; Answer in case 14627-PH; Minute Order of June 29, 1954; Findings of Fact and Conclusions of Law in case 11879-PH; Judgment in case 11879-PH; Findings of Fact and Conclusions of Law in case 14627-PH; Judgment in case 14627-PH; Notice of Appeal in case 11879-PH; Notice of Appeal in case 14627-PH; Appellants' Designation of Contents of Record on Appeal; Order Extending Time to Docket Cause on Appeal in case 11879-PH; Order Extending Time to Docket Cause on Appeal in case 14627-PH; which, together with the Reporter's transcript of Proceedings on Trial, and the original Plaintiff's Exhibits 1 to 4, inclusive, and Defendants' Exhibits A, B, and C, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 7th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14647. United States Court of Appeals for the Ninth Circuit. Harry C. Westover, Former Collector of Internal Revenue, Sixth Collection District of California, Appellant, vs. Stockholders Publishing Company, Inc., a Corporation, Appellee. Robert A. Riddell, Collector of Internal Revenue, Sixth Collection District of California, Appellant, vs. Stockholders Publishing Company, Inc., a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed February 8, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14647

WESTOVER and RIDDELL,

Appellants,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC.,

Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit, the following are appellants' Statement of Points on Appeal:

I.

The District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the plaintiff-appellee.

II.

The trial court erred in that the evidence does not support the findings of fact.

III.

The trial court erred in that the conclusions of law are not supported by the findings of fact.

IV.

The trial court erred in that the judgment is not supported by any substantial evidence.

V.

The trial court erred in that the plaintiff-appellee did not sustain its burden of proof in the trial court.

VI.

The trial court erred in certain rulings wherein testimony of plaintiff-appellee's witnesses was admitted into evidence over the objection of defendants-appellants' counsel.

VII.

The trial court erred in sustaining the objection of plaintiff-appellee's counsel to certain questions propounded by defendants-appellants' counsel notwithstanding an offer of proof.

Dated: This 23rd day of February, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

BRUCE I. HOCHMAN,
Assistant U. S. Attorney;

/s/ BRUCE I. HOCHMAN,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 24, 1955.

No. 14647

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant,

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation,

Appellee.

On Appeal From the Judgments of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

H. BRIAN HOLLAND,
Assistant Attorney General,
ELLIS N. SLACK,
A. F. PRESCOTT,
STANLEY P. WAGMAN,
Special Assistants to the Attorney General.

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States Attorney,
Chief, Tax Division,
BRUCE I. HOCHMAN,
Assistant United States Attorney.
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellants.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14647

IN THE

United States Court of Appeals

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On Appeal From the Judgments of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLANTS.

Opinion Below.

The District Court's findings of fact and conclusions of law [R. 31-37, 39-44] are not reported.

Jurisdiction.

This appeal involves federal social security taxes. The taxes in dispute were paid as follows: $17,013.04 on December 15, 1948 [R. 4]; $8,796.64 on July 12, 1950 [R. 19]. Claims for refunds were filed on April 21, 1949 [R. 4], and July 31, 1950 [R. 19], respectively, and were rejected by notices dated October 20, 1949 [R. 13-15], and October 27, 1950 [R. 24-26], respectively.

Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 7, 1950 [R. 15], and October 20, 1952 [R. 26], the taxpayer brought actions in the District Court for recovery of the taxes paid. These two causes were consolidated for all purposes pursuant to the minute order of the District Court dated June 29, 1954. [R. 30-31.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. Judgments were entered on July 14, 1954. [R. 37-38, 45-46.] Within 60 days and on August 26, 1954, notices of appeal were filed. [R. 47-48.] Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

Question Presented.

Whether the dealers and route district men engaged in the distribution of taxpayer's newspapers are employees within the meaning of Section 1607 of the Internal Revenue Code of 1939.

Statute and Regulations Involved.

The applicable portions of the relevant statute and Regulations are set forth in the Appendix, *infra.*

Statement.

The Collectors contend that the District Court failed to find sufficient material primary facts upon which to support its ultimate findings and that its ultimate findings are clearly erroneous as not supported by the weight of undisputed evidence and for the reasons hereinafter stated in the argument.

So far as is pertinent to the issues here involved, the District Court merely found as primary facts that [R. 34-35] in the years 1943 and 1944 the taxpayer was in

he business of publishing a daily newspaper, the Daily News, at Los Angeles, California; that the taxpayer, as ublisher and distributor of the Daily News, sold newsapers to certain route district men and dealers (hereinfter called wholesalers or route men) at a "wholesale" rice and was paid therefor by the wholesalers; and that he wholesalers resold or offered for resale the newspapers o purchased by them and retained any excess over the ost of the newspapers. The District Court then found s ultimate fact and concluded as a matter of law [R. 6] that the wholesalers were not employees of the taxayer and that their earnings were, therefore, nontaxable nder the Federal Unemployment Tax Act.

The additional material primary facts not found by the District Court but supported by undisputed record evidence [R. 51-134], establishing as clearly erroneous the District Court's ultimate finding and conclusion of law that the elationship between taxpayer and its wholesalers was that f seller and purchaser or independent contractor, rather han employer and employee, are as follows:

Distribution of the taxpayer's newspapers was made hrough its circulation department made up of office, supervisory and transportation employees, three intermediary listribution groups designated as street district men, route listrict men and dealers and, finally, street vendors and ome-delivery carrier boys. [R. 54, 65, 67-68, 94; Deft. Ex. A,[1] pp. 4, 12, 19-20.] The status of the route district

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[1]All of the exhibits introduced and admitted at the trial were esignated by the appellants for printing as part of the record on ppeal. However, they were not included by the Clerk of this Court with the other portions of the record for printing. Instead, ppellants were furnished with the original exhibits for reference n the preparation of their brief. All references are to those original xhibits, which have been returned to the Clerk.

men and dealers is here in dispute. During the period here involved taxpayer and its route men were governed in their relationship by contract with the Los Angeles Newspaper Guild, the authorized representative of the organized route men. [R. 71, 84; Deft. Exs. A, B, C.]

The street district men are salaried workers who distribute newspapers to newsboys and newsstands for sidewalk sales in the city. These distributors are conceded to be employees and taxpayer has always reported their earnings in its employment tax returns.[2] The route district men handle subscription home delivery distribution in the city area and the dealers handle either home delivery or single copy sales distribution or both in suburban areas. [R. 67-68.] All individuals engaged as route district men and dealers were over 18 years of age. They were engaged pursuant to job application and interview [R. 107-108] and were under the continuing authority of supervisors who in turn were subordinate to a circulation manager. [R. 90-91, 94.]

The route man's job was to maintain regular and competent delivery service to taxpayer's subscribers and strive to maintain maximum circulation of taxpayer's newspapers in keeping with taxpayer's policies. [Pltf. Ex. 1, Sec. 1, par. 1.] In this regard, he had to be available when the papers were spotted by the publisher's trucks (dropped-off at prearranged points in the route man's distribution area), pick them up and get them out to the Daily News readers (usually with the help of carrier boys), see that

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[2]The Internal Revenue Service letter of October 16, 1947 [R. 14], which served as the basis for taxpayer's complaint [R. 3-15], is unchallenged so far as these primary facts are concerned. At any rate, they merely serve as background material to the question now before this Court.

the money was collected and payment made to the publisher monthly for the full allotment of papers. [R. 106.] Taxpayer furnished the route men with lists of subscribers and their addresses, or locations of single copy sales points, which were not to be revealed to any person other than a duly accredited representative of taxpayer and were to be returned with any additions made by the route men upon request. [Pltf. Ex. 1, Sec. 1, par. 7.]

Taxpayer fixed the wholesale and retail prices of its papers. [Pltf. Ex. 1, Sec. 1, par. 2; Sec. 3, par. 1.] The distribution area where the route man would have to work and the physical or geographical limits of that area were also fixed and determined by taxpayer. [Pltf. Ex. 1, Sec. 1, par. 8.] It could not be expanded or contracted by the route man but could be revised by taxpayer against his wishes. [R. 87.] He could not work for a competitive publisher and do the same work. [R. 92; Deft. Exs. A, B, Sec. 13; C, Sec. 8.] He could be fired without notice [Pltf. Ex. 1, Sec. 4] or, if dissatisfied, could quit. [R. 90, 123; Pltf. Ex. 1, Sec. 5.] He had to work a minimum number of hours so divided as to meet the requirements of his duties (except suburban dealers) [R. 92; Deft. Exs. A, B, C, Sec. 3], was guaranteed a minimum amount of net earnings per week for his services [R. 90; Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22], a vacation with pay [R. 91; Deft. Exs. A, B, Sec. 7; C, Sec. 6], sick leave with pay [Deft. Exs. A, B, Sec. 6; C, Sec. 5], and was covered by workmen's compensation insurance [R. 73] and a collective bargaining agreement. [R. 85; Deft. Exs. A, B, C.] He was prohibited from entering into agreements with advertisers for the insertion into or stamping onto taxpayer's newspapers of any advertising material. [Pltf. Ex. 1, Sec. 2, par. 1.] Nor could he

assign or transfer his job or any interest therein. [Pltf. Ex. 1, Sec. 2, par. 2.] Although he used his own car, the minimum guaranty of net earnings per week was computed by deducting automobile allowances and other authorized expenses from the net difference that he retained between the price he was charged and in turn charged the carrier boys for the papers allotted. [Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22.] And there was provision made for the crediting of unsold newspapers. [Pltf. Ex. 1, Sec. 1, par. 4.]

Taxpayer maintained a general office which the route men used rent-free for their paper work, etc. [R. 88, 119.] Taxpayer's supervisors carried on a continuing promotional program with the route men. Meetings were held in which distribution techniques were discussed and criticized, material distributed and suggestions made. [R. 82-83, 122.] These were followed since it was in the route man's best interest to do so. [R. 106-107.]

Upon the basis of the total factual complex disclosed by the record, the Collectors have appealed the decision of the court below.

Statement of Points to Be Urged.

1. The District Court erred in that the evidence does not support the ultimate findings of fact.

2. The District Court erred in that the judgment is not supported by any substantial evidence.

3. The District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the taxpayer.

4. The District Court erred in not finding and concluding that the individuals concerned were engaged as a

means of livelihood in regularly performing personal services which (1) constituted an integral part of taxpayer's business operation; (2) were not incidental to the pursuit of a separately established trade or business—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) were subject to a reasonable measure of general control over the manner and means of their performance.

Summary of Argument.

The court below failed to find sufficient material primary facts upon which to base its ultimate findings and conclusions. And these ultimate findings and conclusions are clearly erroneous as not supported by the weight of undisputed evidence. The totality of material primary facts amply demonstrates that the dealers and route district men were employees within the meaning of Section 1607 of the Internal Revenue Code of 1939. That is, according to traditional common law notions realistically applied, they are well within the class of working people intended by Congress to receive the benefits and protection of its social security program against the hazards of modern business competition unless expressly excepted. No such exception applies in this case.

As a question of fact, not only did taxpayer control the mechanics of its distribution operation, but it also exercised a very powerful economic control over the dealers and route district men engaged therein. Taxpayer fixed the location and size of the territory to be handled. It fixed the wholesale and retail prices of its newspapers. It forbade similar employment on the part of its dealers and route district men for a competitive newspaper. It

forbade any independent arrangements between its route district men and dealers and advertisers for the insertion of advertising matter. And it controlled the subscription lists. The services performed by the workers involved constituted an integral part of taxpayer's business and were not incidental to the pursuit of a separately established trade or business. When the workers' relationship with the taxpayer ceased they were out of a job, like any employee. And this situation dramatically occurred just before Christmas of 1954 when taxpayer stopped its presses and was later declared a bankrupt. Nor was there any opportunity for profit or loss based upon any capital investment in the light in which those factors have been considered by the Supreme Court as tending to establish an independent contractor status. The only real investment was made by the taxpayer and, although some of the dealers and route district men used their own cars, they were guaranteed a net remuneration per week which was computed by deducting from gross earnings automobile and other authorized expenses. And provision was made for the return of unsold papers. Finally, the relationship was a potentially permanent one, unlike that with an independent contractor which normally expires at the end of a particular job or result.

As a question of law, this case should be controlled in principle, within the general framework set down by the Supreme Court and Congress, by the well-reasoned opinion in *Hearst Publications v. United States,* 70 Fed. Supp. 666 (N. D. Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th), and two others decided the same day. It should be left to Congress to add to the express exceptions from coverage within its social security program.

ARGUMENT.

The Workers Involved Were Employees for Social Security Purposes Within Traditional Common Law Notions and as a Matter of Economic Reality.

A. The Statute.

The Social Security Act[3] was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly unemployment and old age. It was enacted in an effort to coordinate the forces of government and industry for solving these problems.[4] The principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the elderly and compensation to workers during periods of unemployment. We are here concerned with the Federal Unemployment Tax Act, which is Subchapter C of the Internal Revenue Code of 1939. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation.

Employers do not pay taxes on certain specifically exempt groups of employees. Internal Revenue Code of

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[3]Social Security Act. C. 531, 49 Stat. 620.

[4]Message of the President, January 17, 1935, and Report of the Committee on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess.; S. Rep. No. 628, 74th Cong., 1st Sess. (1939—2 Cum. Bull. 611); S. Rep. No. 734, 76th Cong., 1st Sess. (1939—2 Cum. Bull. 565); H. Rep. No. 615, 74th Cong., 1st Sess. (1939—2 Cum. Bull. 600); H. Rep. No. 728, 76th Cong., 1st Sess. (1939—2 Cum. Bull. 538); *Steward Machine Co. v. Davis,* 301 U. S. 548; *Helvering v. Davis,* 301 U. S. 619.

1939, Sec. 1607(c) (Appendix, *infra.*) So far as may here be relevant, only the service performed by an individual *under the age of 18* in the delivery of newspapers, but *not including delivery or distribution to any point for subsequent delivery or distribution;* and the service performed by an individual *in and at the time of the sale of newspapers to ultimate consumers* have been excepted. 1939 Code, Sec. 1607(c)(15)(A) and (B). Taxes are laid as excises on a percentage of the wages paid the nonexempt employees. 1939 Code, Sec. 1600 (Appendix, *infra*). "Wages" means all remuneration for the employment that is covered by the Act. 1939 Code Sec. 1607(b) (Appendix, *infra*). "Employment" means "any service performed * * * by an employee for the person employing him" with certain express exceptions. 1939 Code Sec. 1607(c). "Employee" does not include any individual who under normal common law rules has the status of an independent contractor or who would not be an employee under such rules. 1939 Code Sec. 1607(i) (Appendix, *infra*).

B. Application of the Statute to the Facts of This Case.

The question presented is whether the relationship between taxpayer and its so-called dealers and route district men was that of employer and employee for purposes of the Federal Unemployment Tax Act or, stated another way, whether the status of the workers involved was such as to come within the intended coverage of that Act. Nearly a decade ago, when the Supreme Court first con-

sidered the social security program[5] and established the fundamental precepts by which such legislation is still to be construed and applied (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7), Mr. Justice Reed, delivering the opinion of that Court in *United States v. Silk,* 331 U. S. 704, said *inter alia* (pp. 711-712):

> The very specificity of the exemptions * * * and the generality of the employment definitions indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would * * * invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.

In the intervening years prior to this decision of the Supreme Court a lack of uniformity had developed in Federal District and Circuit Court decisions construing the

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[5]To set forth its views and reconcile developing conflicts in the lower courts, the Supreme Court issued writs of certiorari to the Tenth Circuit in *United States v. Silk* (with which was joined *Harrison v. Greyvan Lines, Inc.,* on certiorari to the Seventh Circuit), 331 U. S. 704 (decided June 16, 1947), and *Bartels v. Birmingham,* 332 U. S. 126 (decided a week later). The same problem (arising under the Fair Labor Standards Act) was involved in *Rutherford Food Corp. v. McComb,* 331 U. S. 722, on certiorari to the Tenth Circuit (decided the same day as the *Silk* case.). These together with *Labor Board v. Hearst Publications,* 322 U. S. 111 (dealing with this problem under the National Labor Relations Act), are the leading cases treating with the concept of employment within the purview of federal remedial legislation.

term "employee." The general tendency among the lower federal courts, when presented with the problem of determining the existence of an employer-employee relationship, was to adopt the precedents of local law. These varying among the different states, considerable conflict in lower court decisions followed even though the factual situations were not unlike. Moreover when the cases presented were on a claim for benefits, the courts tended to a liberal construction. On the other hand, when the cases were on an assessment of taxes, particularly when penalties were involved, the courts tended to construe the term more strictly. To resolve the conflict, the Supreme Court assumed jurisdiction of *United States v. Silk,* 331 U. S. 704; *Harrison v. Greyvan Lines, Inc.,* 331 U. S. 704; and *Bartels v. Birmingham,* 332 U. S. 126. Its decision affirmed that the usual common-law rules, *realistically applied,* must be used to determine whether a person is an "employee."

The usual common-law rule defining an "employee" is well stated in the Treasury's regulation,[6] *inter alia,* as follows:

> Generally such relationship exists where the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. * * * In

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[6]Sec. 403.204 of Treasury Regulations 107, promulgated under the Federal Unemployment Tax Act (Appendix, *infra*).

> this connection, *it is not necessary that the employer actually direct or control the manner in which the services are performed*; it is sufficient if he has the right to do so. * * * (Italics supplied.)

It has been accepted as an authoritative definition of the distinction between an "employee" and an "independent contractor." *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715, 717 (C. A. 2d); also see S. Rep. No. 1255, *supra,* p. 4. To have a *realistic* application of this rule in construing federal social security legislation the Supreme Court would include within the definition of "employee" workers who were such as a matter of economic reality. See *Labor Board v. Hearst Publications,* 322 U. S. 111; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *Helvering v. Davis,* 301 U. S. 619, 641. And in measuring a worker's dependent economic status degrees of control, opportunities for profit or loss, investment in facilities, permanency of the relation, special skill or preparatory training required are suggested as material factors. *United States v. Silk, supra,* p. 716; see also *Schwing v. United States,* 165 F. 2d 518 (C. A. 3d); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40, 45 (C. A. 5th). But the *caveat* immediately follows that no one factor is to be controlling nor is the list complete.

The material factors applied to the totality of established facts in this case compel the conclusion that the dealers and route district men were employees.

1. The Control Factor.

The common-law test of the employment relationship contemplated only a "reasonable measure of direction and control" which "need not relate to every detail"[7] (*Jones v. Goodson,* 121 F. 2d 176, 180 (C. A. 10th)), but is to be determined by the nature of the work and the experience of the employee.[8] Immediately, the fact that the dealers' and route men's maximum earnings depended on the amount of their sales would tend to obviate any instruction to increase sales. Anyone operating on a piece-meal or commission basis is moved by self-interest to increase his production or sales. See, *e. g., United States v. Silk,*

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[7]The rule of "complete control" announced in *Bohanon v. James McClatchy Pub. Co.,* 16 Cal. App. 2d 188, 60 P. 2d 510, has not been followed even in California, in defining the employment in remedial legislation. *Twentieth Etc. Lites v. Cal. Dept. Emp.,* 28 Cal. 2d 56, 168 P. 2d 699; *Grace v. Magruder,* 148 F. 2d 679 (C. A., D. C.). In any event, federal courts are not bound by state court decisions in their interpretation of national social security legislation. *Labor Board v. Hearst Publications, supra;* also see *Hearst Publications v. United States,* 70 Fed. Supp. 666, 672 (N. D. Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th). *A fortiori,* the decision of a state or local administrative board regarding the state's own social security program [Pltf. Ex. 2] is distinctly inconclusive, irrelevant and immaterial. *Matcovich v. Anglim,* 134 F. 2d 834, 836-837 (C. A. 9th), certiorari denied, 320 U. S. 744. For these reasons it was prejudicial error for the trial court to admit Plaintiff's Exhibit 2 in evidence as well as any testimony in relation thereto. [R. 55, 74-79.] See *Matcovich v. Nickell,* 134 F. 2d 837 (C. A. 9th), and *Matcovich v. Anglim, supra.*

[8]*Walling v. American Needlecrafts,* 139 F. 2d 16 (C. A. 6th); *Western Express Co. v. Smeltzer,* 88 F. 2d 94 (C. A. 6th); *Peasley v. Murphy,* 381 Ill. 187, 44 N. E. 2d 876; *Andrews v. Commodore Knitting Mills,* 257 App. Div. 515, 13 N. Y. S. 2d 577. "The nature of the employee's work may be such that much or little supervision may be necessary." *Fisher v. Industrial Commission,* 301 Ill. 621, 629, 134 N. E. 114, 117. See also *Western Express Co. v. Smeltzer, supra; Franklin Coal Co. v. Industrial Commission,* 296 Ill. 329, 129 N. E. 811; *Eagle v. Industrial Comm.,* 221 Wis. 166, 266 N. W. 274.

supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra; Schwing v. United States, supra; Tapager v. Birmingham, 75 Fed. Supp. 375 (Iowa); and *Atlantic Coast Life Ins. Co. v. United States,* 76 Fed. Supp. 627 (E. D., S. C.). But, nevertheless, taxpayer's supervisors conducted a continuing sales promotional program with these workers, holding meetings, distributing materials to stimulate circulation, criticizing distribution techniques and encouraging better work. [R. 82-83, 122; Pltf. Ex. 1, Sec. 1, par. 1.] The supervisors were in turn responsible to the circulation managers. [R. 90-91, 94.]

The dealers and route men were supplied with lists of subscribers and single copy sales locations which remained the property of the taxpayer, as revised by the dealers and route men, and could not be shown to unauthorized parties. [Pltf. Ex. 1, Sec. 1, par. 7.] They had to work a minimum number of hours, so divided to meet their particular situations. [R. 92; Deft. Exs. A, B. C, Sec. 3.] Clearly they were not engaged to obtain any particular independent result but to perform a continuing supervised integrated service for the taxpayer. They were, indeed, fortunate that the supervisors' policy was to suggest and not order, but that does not make the taxpayer's actual and potential control over how the work was to be done any less real or reasonable.

Besides this control over the mechanics of the integrated distribution operation with which we are concerned, taxpayer exercised a very powerful economic control over its dealers and route men. To begin with, the dealers and route men could not do the same work for any competitive publisher. [R. 92; Deft. Exs. A, B, Sec. 13; C. Sec. 8.] Secondly, taxpayer fixed the geographical

limits of each dealer's or route man's territory and could reduce or change them at will. [R. 87; Pltf. Ex. 1, Sec. 1, par. 8.] Thirdly, they fixed the retail rate at which the papers could be sold to the subscriber or single copy purchaser. [Pltf. Ex. 1, Sec. 1, par. 2.] This effectively limited the price at which the dealers and route men could charge out their papers to the carrier boys. And there is strong evidence that the taxpayer even fixed the so-called "wholesale" prices. Beyond the express language to that effect in the individual work contracts [Pltf. Ex. 1, Sec. 1, par. 2, Sec. 3, par. 1] the negotiations between the dealers and route men and the carrier boys was always subject to the review of the supervisors and were often effected in accordance with their suggestions. [R. 70, 89.] It is apparent that the taxpayers, like the publishers in *Labor Board v. Hearst Publications,* 322 U. S. 111, 117-118, "in a variety of ways prescribe[d], if not the minutiae of daily activities, at least the broad terms and conditions of work." See *United States v. Vogue, Inc.,* 145 F. 2d 609 (C. A. 4th).

Certainly the control here present cannot be likened to that in *Henry Broderick, Inc. v. Squire,* 163 F. 2d 980 (C. A. 9th); *Haley v. United States* (N. D., Ind.), decided February 12, 1944; *Cannon Valley Milling Co. v. United States,* 59 Fed. Supp. 785 (Minn.); *Spirella Co. v. McGowan,* 52 Fed. Supp. 302 (W. D., N. Y.), and similar cases, where the individuals concerned were free to do and go as they pleased. The existence of at least designated sales territories, minimum sales quotas and number of working hours, and attendance at sales meetings, however—all present in this case—would, in those cases, have satisfied an ultimate finding or conclusion that

certain individuals were employees. *Rambin v. Ewing,* 106 Fed. Supp. 268 (W. D., La.); *Sterns v. Clauson,* 122 Fed. Supp. 795 (Me.); *Levin v. Manning,* 124 Fed. Supp. 192 (N. J.). Here the dealers and route men formed an integral part of the whole operation of taxpayer's business and there was little they could do to shape policy or carry on their activities independently of or in opposition to the taxpayer. *Cf., Beckwith v. United States,* 67 Fed. Supp. 902 (Mass.); *Bedford Pulp & Paper Co. v. Early* (E. D., Va.), decided April 6, 1944; *Tapager v. Birmingham, supra; Pure Baking Co. v. Early* (E. D., Va.), decided May 7, 1943; *Stone v. United States,* 55 Fed. Supp. 230 (E. D., Pa.), where an employee-employer relationship was determined. In fact, the control thus exercised is far greater than that which has regularly been sufficient to establish the existence of an employer-employee relationship. See: *Bartels v. Birmingham,* 332 U. S. 126; *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *United States v. Wholesale Oil Co.,* 154 F. 2d 745, 748-749 (C. A. 10th); *Matcovich v. Anglim,* 134 F. 2d 834 (C. A. 9th), certiorari denied, 320 U. S. 744; *Matcovich v. Nickell,* 134 F. 2d 837 (C. A. 9th).

The fact that the dealers and route men enlisted the services of carrier boys on their own behalf does not detract from the control exercised by the taxpayer or characterize them as independent contractors. *Tomlin v. United States,* 70 Fed. Supp. 677 (N. D., Cal.); *Stewart-Jordan Distributing Co. v. Tobin,* 210 F. 2d 427 (C. A. 5th). The right to control and the exercise of control presupposes there is some choice or discretion in the method and means of performing the service involved, whereas, being a carrier boy is not a skilled occupation and home delivery of newspapers is simple and standardized. Again,

they too were motivated by the common incentive. Thus, the absence of direct control over the carrier boys is not a significant factor. *United States v. Vogue, Inc., supra; Hearst Publications v. United States,* 70 Fed. Supp. 666 (N. D., Cal.), affirmed *per curiam,* 168 F. 2d 751 (C. A. 9th). What is significant, however, is the fact that the carrier boys and their parents resorted to the authority of the taxpayer and its supervisors in rectifying their arrangements with the dealers and route men. [R. 70, 89.]

2. The Integration Factor.

Taxpayer's business is, manifestly, the gathering of news and its dissemination to the public while it is still "news." It is not in the business of selling printed newspapers at wholesale to dealers and route district men, amongst others. *Hearst Publications v. United States, supra.* Paid circulation is the life-blood of any newspaper. Its advertising income depends upon it. Hence, taxpayer's circulation department—with its promotional schemes and the supervision of distribution down to the ultimate consumer—is, by the very nature of taxpayer's business, an integrated and key part of the enterprise and those performing the different services must be deemed its employees. Conversely, it cannot be said that the dealers and route men have an independent calling or business of their own which is integrated with the taxpayer's business. This appears from a number of factors. They cannot perform similar services for competing newspapers. They do not hold themselves out to the public as doing business in their own name. [Deft. Ex. B, Sec. 20, par. 2.] The only name associated with the sale of newspapers is the name of the newspaper being sold, which appears on the newspaper and the taxpayer's racks

which hold the papers. In fact, where the papers are delivered by carrier boys, the readers may not even know the route man or dealer. Advertising is done by the taxpayer. [Pltf. Ex. 1, Sec. 1, par. 1.] Promotional materials are supplied by the taxpayer. Continuing supervision is exercised by the taxpayer. The size and location of distribution areas are determined by the taxpayer. The dealers and route men could not contract independently for additional advertisements in their allotment of papers [Pltf. Ex. 1, Sec. 2, par. 1], nor can they assign their "business" or any interest therein. [Pltf. Ex. 1, Sec. 2, par. 2.] The furnishing of office facilities in taxpayer's building [R. 88, 119], is yet further evidence of the employee's status. *Capital Life & Health Ins. Co. v. Bowers,* 186 F. 2d 943 (C. A. 4th).

The crucial and incontrovertible fact regarding integration of the processes intermediary to ultimate public sale of taxpayer's newspaper is that taxpayer at all times recognized itself as bearing the economic consequences of circulation—good or bad. This is made plain by the express provisions throughout the agreement with its dealers. [Pltf. Ex. 1.] The very first covenant extracted from the dealer is that he will use his earnest and conscientious efforts to promote the circulation of taxpayer's newspaper. This was to be done by frequent distribution and display of such advertising matter as taxpayer would supply. If taxpayer was in the business of selling a publication at wholesale, it would fall on the dealer to stimulate his own retail distribution and taxpayer would engage persons in the general business of distributing publications. This is distinctly not a characteristic of the newspaper business. It is crucial to the success of this business that the publisher have a tight control over the

entire operation from the moment the news is received to the moment it hits the streets in printed form. The recent "Yalta papers" disclosure points this up sharply.

Closely connected with this insistence on supervised circulation promotional campaigns are the provisions for retaining all subscriber lists, etc., as the exclusive property of the newspaper and the prohibition against the dealers entering into arrangements with advertisers whereby advertisements of their products would be stamped on or inserted into taxpayer's newspapers. If this were a simple arrangement of purchase and sale of a commodity, apparently title should rest in the purchaser upon delivery. He should then be able to deal with his property as he pleases and put it to the most profitable use. The unavoidable truth of the instant matter is thereby brought sharply into focus. The commodity dealt in by the taxpayer is world, national and local news for the enlightenment of the public, put into printed form as a convenience in circulation. It is not in the wholesale publishing business. And, of course, the mere fact that the dealers are declared in the individual contract to be engaged in an independent business is immaterial. *Griffiths v. Commissioner,* 308 U. S. 355, 358; *United States v. Silk,* 331 U. S. 704; *Bartels v. Birmingham,* 332 U. S. 126; *Matcovich v. Anglim, supra; Williams v. United States,* 126 F. 2d 129 (C. A. 7th). The courts have uniformly been quick to prevent seemingly calculated attempts to escape liability under the federal remedial statutes. *Rutherford Food Corp. v. McComb,* 331 U. S. 722; *Tobin v. Anthony-Williams Mfg. Co.,* 196 F. 2d 547 (C. A. 8th); *McComb v. Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C. A. 4th); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40 (C. A. 5th); *Western Union*

Tel. Co. v. McComb, 165 F. 2d 65 (C. A. 6th); *King v. Southwestern Greyhound Lines,* 169 F. 2d 497 (C. A. 10th). As this Court has said, "legal relationships are determined not by labels but by contractual provisions, interpreted according to law." *Childers v. Commissioner,* 80 F. 2d 27, 31 (C. A. 9th); see also *Watson v. Commissioner,* 62 F. 2d 35, 36 (C. A. 9th).

From the foregoing it is plain that the dealers and route men, in so far as both price and distribution policies are concerned, are not at all in the position of independent merchants, who purchase goods from whom they please, under such terms and conditions as they choose and dispose of their products at such time and place and price as they can best determine. Another excellent indication of the extent of the integration and the fact that the route men and dealers are engaged in taxpayer's business is that taxpayer finds it necessary to use them in areas where it knows it will be necessary to pay them something to permit their earning the minimum guaranteed by the collectively bargaining employment contracts. [R. 123.] These facts clearly meet any possible test of integration for purposes of determining the existence of an employer-employee relationship under the Federal Unemployment Tax Act as that factor has been weighed by the courts. See, *e. g., Rutherford Food Corp. v. McComb, supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra.*

It is also important to note, both from the standpoint of control and integration, that the taxpayer retained a string by which to pull back and revoke the entire agreement with any dealer. [Pltf. Ex. 1, Secs. 4, 5.] Nor did any dealers or route men have the right or power to

assign their "business" or any rights or interest therein. From the standpoint of economic reality, when their relationship with the taxpayer was terminated, they lost their source of income and, in short, were "out of a job" like any employee. [R. 123.] This is precisely the hazard status intended to be covered by the Federal Unemployment Tax Act. *United States v. Silk, supra; Fahs v. Tree-Gold Co-op. Growers of Florida, supra.*[9] Moreover, no form of agreement between taxpayer and the route district men was introduced. They would appear to be subject to even greater control. The obvious purpose of such agreements, as in the case of the dealers, would simply be to provide for the effective and ultimate sale of newspapers to the public, which was the taxpayer's business.

Finally, the collective agreements governing the relationship of taxpayer and the dealers and route men [Deft. Exs. A, B, C] establish even more conclusively that the latter performed an integrated operation in taxpayer's business and were subject to such control as to be deemed its employees. It would be sufficient to refer to the provisions for vacations with pay, overtime compensation, sick leave with pay and severance pay, alone, to support this contention. But, in addition, there are provisions concerning mealtimes, advancement opportunities and "outside" activity. We have earlier made reference to the fixed work week so divided as to meet duty requirements and the guarantee of a weekly minimum remuneration. It is entirely unlikely that one dealing with an independent contractor would assume such obligation. It would be totally

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[9]The discussion under subheading B(4) of the Argument, below, shows how dramatically this state of affairs has recently arisen to support the Collectors' contentions.

nnecessary for him to accept such conditions in an arm's-ength bargain with those engaged in their own business. 'hese facts should not have been virtually ignored by the ɔurt below.[10]

3. Investment in Facilities; Opportunities for Profit and Loss.

Clearly there was no opportunity for profit or loss based pon any capital investment in the light in which those actors were considered by the Supreme Court in the *Silk* ase. To begin with there was virtually no capital invest-ıent whatever. The subscription lists remained the prop-rty of the taxpayer. Although the dealers and route men sed their own cars, if necessary, their net earnings for urposes of the guaranteed minimum weekly remuneration re computed by deducting from gross earnings automo-ile expenses at a fixed rate per mile or lump-sum *mini-ıum* per week. [Deft. Exs. A, Sec. 26; B, Sec. 25; C, ec. 22.] And in no event would the mere fact that the ealers and route men used their own cars be determina-ve of their status as independent contractors. *Perkins ros. Co. v. Commissioner,* 78 F. 2d 152 (C. A. 8th). No ɔecial skill or preparatory training was required of them nd any exercise of business judgment was done by or nder the direction of the supervisors or auditors. By ɔntrast, the real and substantial, if not entire, investment

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[10]A clear indication of the District Court's failure to adequately eigh all of the separate and material factors is in the presiding ıdge's characterization of the status of the workers involved as ing akin to a Cadillac automobile dealership franchise [R. 132] grocery store owner selling nationally advertised beer [R. 133], hich characterization seems to be patently notional and must have recluded any thorough consideration of the entire factual complex eculiar to the operations of taxpayer's dealers and route district en.

and assumption of risk was entirely on the part of the taxpayer. Much of that investment, such as high speed presses, typesetting, wirephoto equipment and the like, was obviously designed to facilitate immediate distribution of the news in the form of printed newspapers. To complete the picture, the taxpayer supplied racks where necessary, maintained an office [R. 88, 119], and did the advertising. Phones, when necessary, were listed in the taxpayer's name. [Deft. Ex. B, Sec. 20, par. 2.]

Finally, there was no real opportunity for loss in any real sense since (a) retail and wholesale prices were fixed by the taxpayer so that there would be some net difference as gross earnings [Pltf. Ex. 1, Sec. 1, par. 2; Sec. 3, par. 1], (b) provision was made in the individual employment contracts for crediting unsold copies with the taxpayer's permission [Pltf. Ex. 1, Sec. 1, par. 4], and (c) the taxpayer guaranteed minimum weekly net earnings. [R. 90; Deft. Exs. A, Sec. 26; B, Sec. 25; C, Sec. 22.] The possibility of loss with respect to papers lost, stolen or destroyed was not shown to be significant. Any such voluntary assumed risk in what is customarily a cash transaction can hardly be considered an opportunity for loss, and is entirely in keeping with an employer-employee relationship. The practice of charging out the dealers and route men with their full monthly allotment is a matter of expeditious bookkeeping and cannot be deemed to connote an arm's-length transaction of purchase and sale. For example, it is a generally well-known practice in many restaurants and bars to require the waiters, who are indisputably employees, to pay for the food and drinks and to bear the loss for any failure to collect from the patron.

In addition to all the foregoing and to paying for the phones, supplying the racks and advertising materials, and

ffice space, taxpayer also guaranteed reimbursement for ll authorized and necessary expenses. The fact that the oute men were required to engage carrier boys on their wn behalf, against this background, is entirely eliminated s a factor of any significant weight or importance. In o way were his guaranteed net earnings affected thereby. Vor could his gross earnings be materially affected since ie taxpayer fixed both retail and wholesale prices, and ie dealers or route men, by arranging to charge out their llotment of newspapers, in turn, to the carrier boys, sim-ly accomplished a shifting of charges with the retention f what would amount to virtually the same "profit" argin.

4. Permanency of the Relationship.

Unlike the relationship between independent contractors -expiring at the end of a particular job or result—the axpayer's contract with its dealers and route district men as a continuing one for an indefinite period. A good lea of this can be gotten from the testimony of F. B. Fahs, a dealer for the taxpayer. His father started with ie Daily News in 1923 and worked for them until his udden death 15 years later. Mr Fahs took over his ather's job and has been with the Daily News ever since. R. 107-108.] Clearly, when the relationship with the axpayer is terminated, these men are out of a job and, ke any employee covered by the Federal Unemployment ax Act, will depend largely upon its benefits to support iemselves and their families while seeking other work. Ve are fortunate, in a very cruel and unfortunate sense, have available in this case stark evidence of the very azards and uncertainties of modern business enterprise gainst whose evil effects the Federal Unemployment Tax

Act throws up its walls. The taxpayer stopped its presses on December 20, 1954. It was declared a bankrupt on or about January 10, 1955. Not only the dealers and route district men here involved, but all its employees lost their jobs. There is no better evidence, we submit, of the dependency and integration of all their jobs than the proceeds of unemployment checks used to provide food, shelter and clothing for themselves and their many dependents. Not having occurred until after the proceedings before the court below, evidence of these facts do not constitute a part of the official record on appeal before this Court. However, the notices, petitions and orders in the bankruptcy proceedings have all been properly filed and certainly constitute facts of which this Court can take judicial notice.

In summary, it seems plain, upon the basis of all the material facts that (1) the District Court erred in that the evidence does not support the ultimate findings of fact; (2) the District Court erred in that the judgment is not supported by any substantial evidence; (3) the District Court erred in finding and concluding that the individuals concerned were independent contractors and not employees of the taxpayer; and (4) the District Court erred in not finding and concluding that the individuals concerned were engaged as a means of livelihood in regularly performing personal services which (i) constituted an integral part of taxpayer's business operation, (ii) were not incidental to the pursuit of a separately established trade or business—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large, and (iii) were subject to a reasonable measure of general control over the manner and means of their performance.

As a question of law, we submit that this case should e controlled in principle, within the general framework stablished by the Supreme Court[11] and Congress,[12] by the ell-reasoned opinion in *Hearst Publications v. United tates,* 70 Fed. Supp. 666 (N. D., Cal.), which this Court ffirmed *per curiam,* 168 F. 2d 751; and by *Gensler-Lee v. Inited States,* 70 Fed. Supp. 675 (N. D., Cal.), and *Tom-n v. United States,* 70 Fed. Supp. 677 (N. D., Cal.), de-ded on the same day.[13] Also see *Grace v. Magruder,* 48 F. 2d 679 (C. A., D. C.); *Schwing v. United States,* 65 F. 2d 518 (C. A. 3d); *Fahs v. Tree-Gold Co-op. Growers of Florida,* 166 F. 2d 40 (C. A. 5th); *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715 (C. A. d); *Capital Life & Health Ins. Co. v. Bowers,* 186 F. 2d 43 (C. A. 4th); *Matcovich v. Anglim,* 134 F. 2d 834 (C. A. 9th), cert. den. 320 U. S. 744. There was before the ourt for consideration in the *Hearst Publications* case the

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[11]*United States v. Silk,* 331 U. S. 704; *Harrison v. Greyvan ines, Inc.,* 331 U. S. 704; *Bartels v. Birmingham,* 332 U. S. 126.

[12]See H. Rep. No. 1319, 80th Cong., 2d Sess.; S. Rep. No. 1255, 0th Cong., 2d Sess.

[13]The *Gensler-Lee* case involved a corporation in the jewelry usiness that engaged a watchmaker in each of its stores to handle atch repairs for its customers. Some were employed on a salary asis and others performed services on a commission basis, the tter being those whose status was in dispute. There was evidence the effect that a lesser degree of control and supervision was xercised over the activities of the watchmakers working on a ommission basis than in the case of salaried watchmakers. The ommission-basis workers provided their own tools and equipment. hey ordered, were billed and paid for the materials used in their ork. In some instances they hired and paid assistants who were nder their sole supervision. Notwithstanding, the commission-asis watchmakers were found by the court to be employees, rely-g upon such facts as that newspaper and radio advertising of atch repairs was done in the taxpayer's name, and that the hours nd minimum compensation of the commission-basis watchmakers ere prescribed by the terms of a contract effective during the

question of the status of the street vendors serving the different newspaper publishers in the Northern District of California. Obviously, almost identical considerations were involved. Subject to a careful study of the applicable case law, with which this Court need not again be burdened in detail at this time, that court stated, *inter alia* (pp. 670-671):

> From these various decisions there evolves at least one principle,—determinative of this cause in favor of the employment status,—entirely reconcilable with established common law doctrines as developed and grown to meet new situations, and with the remedial objectives of social security legislation, and which is, at the same time realistically practical. That is, that any person is an employee within the meaning of social security legislation who is engaged as

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entire taxable period between the watchmakers' union and the taxpayer.

In the *Tomlin* case, the taxpayer, referred to as Rex, was a copartnership owning coin-operated merchandise vending machines of the crane or claw type. They were placed in various commercial establishments complete with merchandise and equipped to operate at a profit and after 1937 were regularly serviced and periodically emptied of money and redressed by persons engaged as supervisors and operators. It was these men whom Rex disclaimed as its employees. Rex never regulated the hours of work and the supervisors had complete charge of the operative details within their respective territories and engaged the operators themselves in their own behalf. The supervisors retained a portion of the gross profit from the machines as their earnings. They paid to the operators and the location owners a percentage of the profits. The remainder was turned over to Rex. The supervisors were, however, trained by Rex in the business of conducting a route; the manager of Rex made periodical visits to the various territories discussing business and exchanging views; company meetings were called by Rex for these men; the operators were required by Rex to return broken machines to it; routes could only be sold to persons satisfactory to Rex; and Rex retained the right to terminate the relationship at any time. The supervisors and operators were held to be Rex' employees, the exercise of control over the operators being merely a delegated function.

a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk, or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and means of their performance.

Even were the facts in the instant case less strong in favor of the Collectors' contentions, we submit that the application of the foregoing principle in the instant case compels the conclusion, as a matter of law, that the individuals concerned were taxpayer's employees.

In the course of its opinion (p. 673), the court recited the following material facts as supporting its conclusion that the news vendors were the publisher's employees:

> The publishers selected the vendors, designated their place, days and hours of service (within the limits agreed on by contracts) and fixed the profits they were to derive from the sale of each newspaper (although the profit, once fixed, remained constant for the period of the existing contract). The vendors were expected to be at their corners at press release time, stay there for the sales period, be able to sell papers and take an interest in selling as many papers as they could. To see that they performed properly, they were kept under the surveillance of the *publisher's employee, the "wholesaler."* * * * The vendor was required to sell his papers complete with sections in the order designated by the publisher and to display only newspapers on the stands or racks, which were furnished by the publishers at the latter's ex-

> pense. The vendor incurred no expense or risks save that of having to pay for papers delivered him which by reason of loss or destruction he was unable to return for credit. The vendors were not allowed to sell competitive newspapers without the publisher's consent. (Italics supplied.)

Apart from the fact that the "wholesaler" is here involved, the circumstances are virtually identical. And this distinction but serves to strengthen the Collectors' case, for, unlike the news vendor, the job of the wholesaler was one that loaned itself to control and such control was exercised. The publisher in the *Hearst* case, to establish the independent contractor relationship, urged (p. 675)—

> the lack of any right in the publishers to dismiss vendors without cause for the duration of the existing contract, the fact that the vendors provided their own transportation, filed no reports, attended no sales meetings, were not required to report to publishers' premises, have employed substitutes, and were privileged to and some actually sold non-competitive publications and other articles without the publishers' consent.

But these were held not to detract from the employer-employee relationship. And what is more, the converse of these facts appears in the instant case and would even more strongly support a similar conclusion. Finally, it would seem that the taxpayer resolved any doubt that may now exist as to the status of its "wholesalers" when it stated in the *Amici Curiae* Brief of Publishers (p. 6), submitted to this Court in the *Hearst Publishing* case, *supra,* by way of description of its over-all operation, that

> *Publishers' employees,* called "wholesalers," were the only persons who had contact with the vendors on

behalf of the publishers. These wholesalers did not control, and did not have the right to control, the vendors in any way. (Italics supplied.)

In light of the foregoing it is evident that the court be- w erred as a matter of law. Further, when Congress larged its list of classes of employees excepted from verage under the Federal Unemployment Tax Act it pressly and carefully limited such exceptions so as to ake it plain that the services here in question were still thin the intended coverage of the Act. H. Rep. No. 20, 80th Cong. 2d Sess. p. 3. The exception (Sec. 1607) (15) (A) and (B) of the Code), as we have earlier ted, reads:

(A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers * * *.

is aimed at the vendor boys (like those involved in the *earst Publications* case) only. It was a decision moti- ted by considerations of administrative convenience and licy (H. Rep. No. 1320, *supra,* pp. 2-4; S. Rep. No. 5, 80th Cong., 2d Sess., pp. 1-2) which should be left Congress alone to weigh. See *O'Leary v. Social Secu- y Board,* 153 F. 2d 704, 707 (C. A. 3d). The judicial ecedents which serve as a guide for this Court's deci- n remain untrammelled and all-persuasive.

Conclusion.

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General,
Ellis N. Slack,
A. F. Prescott,
Stanley P. Wagman,
Special Assistants to the Attorney General.

Laughlin E. Waters,
United States Attorney,

Edward R. McHale,
Assistant United States Attorney
Chief, Tax Division,

Bruce I. Hochman,
Assistant United States Attorney.

June, 1955.

APPENDIX.

ıternal Revenue Code:

SEC. 1600 [As amended by Sec. 608 of the Social Se-ırity Act Amendments of 1939, c. 666, 53 Stat.. 1360].
ATE OF TAX.

Every employer (as defined in section 1607(a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607(b)) paid by him during the calendar year with respect to employment (as defined in section 1607(c)) after December 31, 1938.

(26 U. S. C. 1952 ed., Sec. 1600.)

SEC. 1607. DEFINITIONS.

When used in this subchapter—

* * * * * * * *

(b) *Wages.*—The term "wages" means all remuneration for employment * * *.

* * * * * * * *

(c) [as amended by Sec. 614 of the Social Security Act Amendments of 1939, *supra*]. *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * * * * *

(15) [as amended by Sec. 2 of the Act of April 20, 1948, c. 222, 62 Stat. 195.] (A) Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price, his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back;

* * * * * * * *

(i) [as amended by Sec. 614 of the Social Security Act Amendments of 1939, *supra,* and Sec. 1 of the Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438.] *Employee.*—The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

* * * * * * * *

(26 U. S. C., 1952 ed., Sec. 1607.)

Treasury Regulations 107, promulgated under the Fedal Unemployment Tax Act:

SEC. 403.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. * * *

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

* * * * * * * *

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

* * * * * * * *

Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment within the meaning of the Act (see section 403.203.)

No. 14647.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY C. WESTOVER, Former Collector of Internal Revenue, Sixth Collection District of California,

Appellant.

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation, and GEORGE T. GOGGIN, Trustee in bankruptcy for its bankrupt estate,

Appellees.

ROBERT A. RIDDELL, Collector of Internal Revenue, Sixth Collection District of California,

Appellant.

vs.

STOCKHOLDERS PUBLISHING COMPANY, INC., a Corporation, and GEORGE T. GOGGIN, Trustee in bankruptcy for its bankrupt estate,

Appellees.

BRIEF OF APPELLEES.

CRAIG, WELLER & LAUGHARN,
By THOMAS S. TOBIN,
817, 111 West Seventh Street,
Los Angeles 14, California,
Attorneys for Appellees.

THOMAS S. TOBIN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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BRIEF OF APPELLEES.

This is an appeal taken by the Government from two judgments of the United States District Court, made and entered by Honorable Peirson M. Hall, United States District Judge for the Southern District of California, on July 14, 1954. These judgments were rendered in two separate actions bearing No. 14647-PH in the sum of $8,796.64, and No. 11,879-PH in the sum of $17,013.04. The issues in both cases were identical except as to names of defendants and dates, and were consolidated for trial by stipulation in open court on June 29, 1954. [Tr. of Rec. pp. 52-53.]

In outlining the issues involved, it was tacitly conceded by counsel for the Government and counsel for the original plaintiff, Stockholders Publishing Company, Inc., now in bankruptcy, that there was but one issue involved, namely, the sole question as to whether or not certain district route managers and dealers were employees of the bankrupt Stockholders Publishing Company, Inc., or were independent contractors, and in the event they were found to be independent contractors as a matter of fact, the bankrupt corporation, Stockholders Publishing Company, Inc., would be entitled to recover a refund of unemployment insurance assessments theretofore paid by the bankrupt corporation. [Tr. of Rec. pp. 62-63.]

The Court then proceeded to take the testimony of the witnesses Arthur G. Pollock [Tr. of Rec. pp. 65-94, incl.], F. B. Fahs [Tr. of Rec. pp. 95-108, incl.] and C. D. Melton [Tr. of Rec. pp. 109-115, incl.], all of whom were called on behalf of the plaintiff. It was stipulated at page 116 of the record that the plaintiff had a number of other witnesses, but that their testimony would be cumulative. At page 117 it was stipulated that if a Fred Hummel, Harry Waters and Glenn Murray were called, their testimony would be substantially the same as the witnesses examined.

The Government called one witness, Samuel G. Mahdesian, whose testimony is found in the transcript of record, pages 117 to 128, inclusive.

After argument, the Court expressed its view from the bench to the effect that the route managers and dealers were independent contractors and not employees of the now bankrupt corporation, and thereafter made formal findings of fact and conclusions of law accordingly.

The viewpoint of the trial court is set out in the transcript of record, pages 129 to 131, inclusive.

Subsequent to the rendition of the judgment, and after the notice of appeal had been filed herein, the Stockholders Publishing Company, Inc., was adjudged a bankrupt in the United States District Court for the Southern District of California, Central Division. George T. Goggin was elected Trustee and obtained permission from the Referee under the provisions of Section 11-c of the National Bankruptcy Act to prosecute as Trustee the defense of the Government's appeal in this case. Application was made to this Court for substitution of the Trustee as party appellee, and an order was made accordingly.

ARGUMENT, POINTS AND AUTHORITIES.

The only issue, as we see it, before this Court is the question of whether or not Judge Peirson M. Hall's findings of fact that the district managers and dealers were independent contractors is a correct finding of fact. We have been unable to find any definite assignments of error on the admission of any evidence or the exclusion thereof. The statement of points to be urged by the appellant, appearing at page 6 of this brief, deals only with the errors on the findings of fact made by the District Court, although in the statement of points upon which appellants intend to rely on appeal [Tr. of Rec. 137 *et seq.*], two indefinite points, numbers VI and VII vaguely assert that "the trial court erred in certain rulings wherein the testimony of plaintiff-appellees' witnesses was admitted into evidence over the objection of defendants-appellants' counsel," and "that the trial court

erred in sustaining the objection of plaintiff-appellees' counsel to certain questions propounded by defendants-appellants' counsel, notwithstanding an offer of proof."

In no way has appellant, either in its brief or its points, specified the errors in ruling on admissibility of evidence in accordance with Rule 20-d of this Court, and we assume that they have been abandoned. (See *Sampsell v. Anches,* 108 F. 2d 945, at p. 948.)

We therefore believe that the sole question before this Court is whether or not the District Judge erred in his finding of fact that these dealers were independent contractors and not employees. We submit that there was substantial evidence received and considered by the District Judge to justify such findings, and there being substantial evidence to sustain such findings, an Appellate Court will not reverse unless they are entirely unsubstantiated by the evidence.

Attacks on the Social Security and Unemployment Insurance Laws have been varied, and decisions thereon are still, in many respects, in a state of flux. We believe, however, in this case, District Judge Hall was justified in his clear finding of fact that these dealers were independent contractors and not employees.

Section 1606 of Title 26, U. S. C. A. defines wages as follows:

> "The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *."

The evidence in this case clearly shows throughout that the Stockholders Publishing Company, Inc. paid no remuneration to its route managers and distributors, but

simply sold newspapers to them to be resold by them at a profit. Any losses incurred in the resale were suffered by the distributors and were not absorbed by the Stockholders Publishing Company unless it overbilled an order, and then only to the extent of the excess papers delivered over and above the distributor's order. We wish to call the Court's attention to the undisputed testimony of the witnesses which substantiate this assertion.

The witness Arthur G. Pollock, whose testimony begins at page 65 of the transcript of record, testified, on page 66, that he was familiar with the overall operation of the circulation department of the Daily News, the paper published by the plaintiff, and that the overall picture was the same in 1943, 1944 and 1945, as it was at the time of the trial. On page 67 he testified:

> "A. Well, during that period route men and dealers purchased their papers at varied wholesale rates. They in turn resell those papers to the carrier boys. The carrier boys in turn sell them at retail to the subscriber."

On page 68 of the transcript, we quote:

> "The Court: Now a route district man, I take it, is somebody who has, say, the West Adams district?
>
> The Witness: That is correct.
>
> The Court: In other words, he buys papers from you for resale to carrier boys in the West Adams district?
>
> The Witness: That is correct.
>
> The Court: So the city is divided into districts?
>
> The Witness: That is correct."

At transcript page 69, the same witness testified as follows:

"Q. (By Mr. Binford): Now you mentioned that you sell to the dealers and route district men at varying wholesale prices. Will you explain that, and why? A. We have no set rate for the reason depending on conditions in that particular area. One area, for instance, may be scattered as to the subscribers, which would take more time, they would be able to handle less papers, the terrain may be hilly, so it may be necessary even to have a car route where a boy on a bicycle couldn't deliver.

All those factors are taken into consideration.

The Court: And in those cases they buy their papers wholesale from you at lesser rates?

The Witness: That is right.

Q. (By Mr. Binford): Then they, as you testified, resell the papers to the carrier boys. Do you fix the price at which they should sell these papers to the carrier boys? A. No, those prices are fixed to a degree by consultation. There is a range that we suggest in order to shall I say, protect the carrier boys from some unscrupulous dealer who might take advantage of them."

At page 70 of the transcript of record, we find the following:

"The Court: When the route district men and the dealers buy, they pay you direct?

The Witness: Yes, sir, on a monthly basis.

The Court: You bill them and they pay you?

The Witness: We bill them for the number of papers they draw each month, but they can change their draw daily. Whatever they draw each month

is totaled at the end of the month and they are billed for that at whatever their rate is.

Q. Then it is up to them to collect ultimately from either the newsboy or the subscriber? A. That is right."

At page 72 of the transcript of record, we find the following:

"Q. (By Mr. Binford): Now under the provisions of that agreement you require a bond of some sort to be put up by the dealers and route district men, is that correct? A. Correct.

Q. How much is that bond, and tell us about the bond, what it is for. A. Well, the bond varies of course in amount and it is arrived at basically on the basis of one and one-half months paper bill. It is used as collateral against the non-payment of the circulation bill.

Q. And what is it, is it a cash bond or is it securities or does it vary depending upon a particular district man or dealer? A. Well, I would say with the exception of probably two or three cases it is a cash bond.

Q. Now a dealer orders a certain number of papers per day with you, is that correct, of the Daily News? A. That is correct.

The Court: They vary from day to day?

The Witness: That is correct.

Q. (By Mr. Binford): It may be up or down day by day? A. That is right.

Q. Supposing he orders ten too many on a given day and you billed him at three and a half cents per paper. Does he lose that 35 cents or is he permitted to return these papers to the Daily News?

A. Well, now, when you say three and a half cents, you mean whatever his rate is?

Q. Whatever his rate is. A. Whatever he orders he pays for.

The Court: Regardless of whether he sells them or not?

The Witness: That is right."

At page 74, we find the following testimony by the same witness:

"Q. (By Mr. Binford): Now with respect to the route district men and dealers, do you make a deduction—if that were possible—for social security for these men? A. No.

Q. Men? A. No.

Q. And do you deduct any sort of withholding tax, withholding on income from these men? A. No.

Q. And do you pay the State of California any amount of money for unemployment? A. No."

At page 81 of the transcript of the record, we find the following:

"Q. Are these men, or do these men, either dealers or route district men or both, occasionally hire helpers or assistants? A. Well, I understand that they do.

Q. Does the Daily News or the Stockholders Publishing Company pay the salary of the assistants? A. No.

Q. In other words, they can hire assistants without your knowledge, I take it from your testimony? A. That is true.

Q. Do you furnish any equipment to the route district men or dealers in order to aid them in their

distribution of the newspapers? A. Not as to the distribution. We do furnish racks.

Q. But you don't furnish things like automobiles or other equipment? A. No."

On the question of who would make the profit on the resale of these papers or bear the loss in other events, we find the following testimony of Mr. Pollock at page 82 of the transcript of record:

"Q. Now if a man put papers on the rack and some citizen steals the paper, who loses the money? A. Well, he still pays for the papers that were billed to him.

Q. So he loses the money? A. He loses the money."

That these dealerships were in the nature of franchises covering designated territory (see *Chevrolet Motor Company v. McCullough Motor Co.*, 6 F. 2d 212 at 213), is evidenced by the following testimony at page 87 of the transcript of record:

"Q. (By Mr. Hochman): Mr. Pollock, suppose X was a district route man and he wished to increase the amount of money he was making could he go into a new section of town and begin a campaign for subscribers by himself? A. No, he has to stay in the territory in which is assigned to him. If there was no business in that territory, but if it came under his general territory, he could. But he couldn't as an individual just go anywhere he so desired.

Q. I didn't have reference to anywhere that he so desired, I had reference to a territory where no one else was. A. Well, the city is divided up so that all the territory is covered. Now I suppose he could go in there and solicit and get paid for

new orders that his carriers make through carrier prizes, or what have you, but he could not get the earnings from serving the subscribers outside of his own territory.

Q. Is it true that an area of a given man can be reduced by the company, Stockholders Publishing Company, whether or not the man wants it reduced? A. That can be done, yes.

Q. That can be done? A. That can be done, either reduced or increased.

Q. By action of the paper, is that correct? A. Well, it is done by mutual agreement."

Again on page 88 of the transcript of record, we find:

"Q. (By Mr. Hochman): Did the company ever reduce a man's district without his consent? A. Not without consultation."

And again with regard to purchase and resale, the same witness testified at page 89 as follows:

"Q. Mr. Pollock, relative to understanding the complete operation here, the newspaper sells the paper to the district men who in turn sell it to the carriers, is that correct? A. That is correct.

Q. Is it your testimony that the newspaper has nothing to do with the price that the district man charges the newspaper carrier? A. Well, I believe I testified that there was a suggested price in there. The prices or the rates to the carrier boys are not all alike. There are many, or at least several, different rates."

The second witness, F. B. Fahs, testified at page 95 as follows:

"A. Well, I buy my papers from the Daily News. I am billed for the papers once a month. The bill is

due on the 10th of the month. The papers in my care are delivered to me by truck at a corner in the city of Lynwood, and that is at the moment. In prior years they were distributed wherever the spots happen to be by mutual agreement with me and the Daily News. The truck spots them at one or perhaps more specific places where I then pick them up and further distribute them to corners or to carrier boys' homes.

Q. Do you do that in a car? A. I do that in my own car."

That the District Managers or distributors bore losses sustained as a result of absconding subscribers and purchasers, is evidenced at page 97 of the transcript of record:

"Q. Supposing that they had somebody walk out on them and didn't pay their bill for the $1.60 a month, who loses that $1.60? A. Theoretically the carrier boy loses it. I bill him for so many papers and he is billed for those papers and he pays for those papers.

As a matter of practical practice, I and many district men—I will speak for myself—will bonus, discount or give the boy a rebate for that move-out.

Q. In other words, so that you will absorb at least possibly some of such loss yourself? A. That is correct.

Q. Does the Daily News reimburse you for that loss? A. No, sir."

The independence of these district distributors is evidenced likewise by Mr. Fahs' testimony at page 97 of the record:

"Q. Now do you have a helper, or have you ever had a helper on your route? A. Yes, sir.

Q. Did you hire him yourself? A. Yes, sir.

Q. Did you pick him out yourself? A. Yes, sir.

Q. Did you pay him a salary or wage? A. I paid him a salary.

Q. And do you deduct social security for him? A. I do.

Q. And does the Daily News reimburse you for the money you pay out for this salary? A. No, sir.

The Court: Does the quantity of papers vary from day to day?

The Witness: It is at my discretion, sir."

At pages 98, 99 and 100, the witness Fahs described his method of doing business. He testified that he had a separate establishment at his home, that he and his wife prepared the bills and receipts to his customers and had the carriers present them on the 25th of each month. Where the customer paid the bill, the carrier tore off the already prepared receipt after signing it, gave it to the customer and delivered the funds to the district distributor. In the event of the dishonoring of a check given by a customer, the check came back, not to the Daily News, but to the distributor. This distributor made an income tax return to the United States Government containing a statement of profit and loss for the year of 1953. [Tr. of Rec. p. 101.] The Daily News did not ever bill this witness for Social Security, nor did it withhold any withholding or income tax or State unemployment tax from him.

That he personally sustained losses for unsold papers in his territory is clearly evidenced at page 102 of the transcript:

"Q. (By Mr. Binford): If you draw too many papers on a given day—

The Court: 'Too many' meaning more than he can sell?

Q. (By Mr. Binford): —more than you can sell, and you have, say, ten papers left over on a day, does the Daily News give you credit if you return those papers? A. No, sir.

Q. They are a loss to you for whatever you pay for them? A. Assuming I have ordered so many, X number of papers, I pay for them whether I sell them or not. If they send me extra copies by error I can return them.

Q. But if they fill your order and you have ordered too many it is your loss? A. Correct."

At page 106, the same witness testified:

"The Witness: I frankly have had very little supervision. You asked the question and let me answer you. Did I do this, or did I do that, or did I not do that? I buy my papers, I put them out, I pay the bill, and aside from a pep talk, a letter, a promotion letter, a suggestion, let's get the boys together to the Pike, or something of that nature, I am let alone. That is why I like my job."

Again on page 107:

"It isn't a matter of, 'Go down in your car and take them a paper right now.' I have never been ordered to do anything of that nature.

The Court: All they do is to relay the complaint to you?

The Witness: They relay it to me and of course it is to my own interest to take care of it."

The third witness, C. D. Melton, testified at page 109:

"Q. Are you billed for those papers by the Daily News? A. Yes, sir."

At page 110:

"Q. Now the carrier boys deliver them to the ultimate consumer or subscriber. Do they send out the billings themselves, the carrier boys? A. No. I make the bills out and furnish them to the boys and they make the collections and pay their bills."

Again at page 110:

"Q. (By Mr. Binford): If there is a move-out, who stands the loss? A. Well, the boy understands when he takes the territory that he stands all losses but I absorb some of it through bonuses. I always mail a bill to the people. All losses, practically all, are move-outs, and if I can't find out from the neighbors where they moved to or collect it for him, or have another district man who is in that part of town, then I mail the bill and give the boy credit at least for the amount of the papers, the cost of those papers.

Q. So he won't take quite as much of a loss? A. Yes, sir. * * *

Q. (By Mr. Binford): Now if you order more papers than you need on a given date, does the daily News give you credit for returned papers? A. No, sir. If I want to change up or down I call it in every day and if I don't then there is extra papers and I pay for whatever comes out on the truck every morning."

With regard to his independence in hiring help, Mr. Melton testified at page 112:

"Q. (By Mr. Binford): You say you have hired helpers in the past. Did you pay their salaries or wages? A. Salary or commission, whatever it happened to be.

Q. Did the Daily News reimburse you for whatever you paid them? A. No, sir, never."

On page 114, the witness Melton testified:

"The amount of money I make is the difference between the rate that the Daily News bills me for the papers and the amount that I bill and collect from the carrier boys.

The Court: Does the Daily News determine what you shall bill and collect from the carrier boys?

The Witness: They never have since I have been there ever said, 'You make the rate so-and-so.'

The Court: Do you fix those rates by negotiation with the boys?

The Witness: By negotiation with the boys."

On page 115, the witness Melton testified:

"Q. (By Mr. Binford): Do you use a car in your business? A. Yes, sir.

Q. To distribute the newspapers to your carrier boys? A. Yes, sir.

Q. Does the Daily News pay for any of the expense of that car? A. No, sir."

The testimony of the witness Samuel G. Mahdesian, called by the Government, did not, so far as we have been able to ascertain, in any material respect contradict the testimony given by the three witnesses called by the plaintiff.

THE LAW.

We note that appellant places strong reliance on the case of *Labor Board v. Hearst Publications,* 322 U. S. 111, wherein the United States Supreme Court reversed this Court on the question of whether or not newsboys were employees of the four Los Angeles papers involved, or were independent contractors. That case came before this Court (136 F. 2d 608) on petition for a review and enforcement of orders of the National Labor Relations Board. The newspapers involved sought to reverse the orders of the National Labor Relations Board, and the National Labor Relations Board petitioned this Court for orders of enforcement. In a two to one decision rendered by Judges Stephens and Mathews, the orders of the National Labor Relations Board were set aside. Judge Denman dissented but was careful to point out that the reason for his dissent was that the National Labor Relations Board, as a trier of fact, had made certain findings which he did not feel that this Court, as an Appellate Court, had a right to overturn. In fact, he qualified his dissent in the following language:

> "If I were free to draw my own inferences from the testimony, I would decide that they were independent contractors, engaged in their own businesses on their respective spots."

Certiorari was granted and the Supreme Court of the United States reversed.

It is significant, however, that the reversal was based on the fact that the original trier of fact had found and concluded that the newsboys in question were employees of their respective papers. The situation is exactly the opposite here. In the *Hearst Publications* case, the original

trier of fact was the National Labor Relations Board, the members of which had taken the testimony, had judged the credibility of the witnesses, and had arrived at certain facts and conclusions. This Court reversed, but as pointed out heretofore in his dissenting opinion, Judge Denman was careful to emphasize that the reason for his dissent was the finality to be accorded to a finding of fact by a trial tribunal where there was substantial evidence to support it, even though he himself would have held differently had he been the original trier of fact.

Justice Reed, speaking for the Supreme Court, followed the same line of reasoning. He said:

> "In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. National Labor Relations Board v. Nevada Consol. Copper Corp., 316 U. S. 105; Walter v. Altmeyer, 137 Fed. (2d) 531. * * *
>
> "Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act,' the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion."

In *Radio City Music Hall Corp. v. United States,* 135 F. 2d 715, cited by appellant at pages 13 and 27 of appellant's brief, we find the Court of Appeals for the Sec-

ond Circuit affirming a judgment in favor of the plaintiff for refund of Social Security taxes erroneously collected. The case was determined by the District Court for the Southern District of New York on a summary judgment, and the Government appealed. In affirming the District Court, the Court of Appeals disposed of the question as to whether or not actors performing in a theatre were employees or independent contractors because of some supervision exercised over them by the plaintiff, in the following language (p. 718):

> "In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed, and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. By far the greater part of Markert's intervention in the 'acts' was no more than this. It is true, as we have shown, that to a very limited extent he went further, but these interventions were trivial in amount and in character; certainly not enough to color the whole relation."

In the case at Bar, the supervision exercised by appellee was purely of a promotional nature. The mere fact that occasionally conferences, pep talks and promotional activities were participated in by the Stockholders Publishing Company, Inc., was nothing more than the ordinary type of campaign to increase sales of its product and thus indirectly profit thereby. In fact, Judge Hall, in our opinion, hit the nail on the head, where at page 133 of the Record he dryly expressed himself as follows:

"The Court: That does not make them employees. It is just general knowledge that a manufacturer, for instance, will put on all kinds of promotional advertising but he still sells beer to the corner groceryman who is an independent contractor and he sells it to him in any way that he can. But because the brewery might put on some singing commercial or put billboards all over a state or put out newspaper advertising, that does not make an employee."

United States v. Silk, et al., 331 U. S. 704, cited by appellant at page 11 of appellants' brief, seems to us to support the position of the lower court rather than undermine it. In that case, the Supreme Court took jurisdiction over two Social Security controversies. One involved a group of men who were unloading coal from cars for the Silk Coal Company. The other case involved a trucking concern which employed other truckers to assist in its activities. In so far as the Silk Coal Company was concerned, the men employed by it to unload coal from freight cars into its bins provided only picks and shovels. As Justice Reed said in his majority opinion:

"* * * we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases."

In the case at Bar, the distributors were in an entirely different position. They stood to gain or lose from the profits or lack of them, obtained in the resale of newspapers to which they had committed their credit resources or their cash to purchase and thus acquire title. The coal heavers in the *Silk* case were, as the Irishman once said, "asked to leave me head at home, to bring me strong back and shoulders every time." (Johnston's "Prison Life is Different," p. 95.)

However, in the same case, the Supreme Court differentiated between the laborers unloading coal and truck drivers, and held that the trucking company and its subordinates were independent contractors. Said Justice Reed:

> "But we agree with the decisions below in Silk and Greyvan that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors."

In the case at Bar, these district distributors maintain their own offices at their homes. They use their own automobiles in distributing papers to the carriers after they had been unloaded by the Daily News at a drop point, and after they had incurred liability for the purchase price

thereof. They hired boys and other assistants as they chose without any direction from the Stockholders Publishing Company, Inc., and without any responsibility on its part to pay them. Certainly if one of these assistants employed by the distributors was not paid his wages, we do not believe any Court in California or anywhere else would have entertained a suit by such employee against the Stockholders Publishing Company, Inc., but would have rendered judgment against the actual employer, the district distributor. If the district distributor failed to pay for his papers, certainly he would be the proper party defendant in an action to recover the amount of the monthly bill rendered to him by the Stockholders Publishing Company, Inc. The Court would be compelled to find, as did the lower court here, that the distributor had purchased and agreed to pay the Stockholders Publishing Company, Inc., for a certain number of papers worth a certain amount, and had failed to do so. If, on the other hand, these district distributors were mere employees, the writer of this brief cannot conceive of any type of complaint that could possibly be framed and made to stand up, to the effect that these distributors had failed to distribute a certain number of papers in a given period. Every element involving vendor and purchaser was present in the transactions described before the District Court. The Stockholders Publishing Company, Inc., sold these papers without any strings attached to the district distributors, and they thereafter resold them to Newsboys and subscribers.

The District Distributors Were Nothing More nor Less Than Franchise Dealers in the Daily News and Independent Contractors.

In *United States v. Mutual Trucking Company,* 141 F. 2d 655, the Court of Appeals for the Sixth Circuit said:

> "We are confirmed in our conclusion by the fact that the tax is expressly required to be computed upon the total wages paid or payable *by the employer.* Title 42, U. S. C., Secs. 1001, 1101, 42 U. S. C. A., Secs. 1001, 1101; Title 26, U. S. C., Secs. 1400, 1600, 26 U. S. C. A. Int. Rev. Code, Secs. 1400, 1600. In this case the appellee paid no wages. The record shows in two instances what wages were paid by the owner-operator. It was testified that the driver received the union scale of two cents a mile. If all wages were paid by this scale they would not exceed twenty-one per cent of the full amount paid to the owner-operators by the appellee. However, the Collector, without any evidence upon this question, determined that a third of the sum paid to the owner-operators constituted wages. This was an arbitrary and illegal determination. Presumably the wages may have varied as between the different owner-operators. As was persuasively said in an analogous decision of the Supreme Court of Ohio, 'The undisputed facts in this case show the impossibility of determining premiums based upon a payroll when there is none, and there can be none in such a situation.' Coviello v. Industrial Commission, *supra* (129 Ohio St. 589, 196 N. E. 663).
>
> "The judgment is affirmed." (Italics ours.)

To the same general effect see:

Fay v. German General Benevolent Society, 163 Cal. 118;

Zipser v. Ewing (C. A. 2d Cir.), 197 F. 2d 728;

Anglim v. Empire Star Mines Co. (C. C. A. 9th Cir.), 129 F. 2d 914;

Texas Company v. Higgins (C. C. A. 2d Cir.), 118 F. 2d 636;

Shreveport Laundries v. United States, 84 Fed. Supp. 435;

W. P. Brown & Sons Lumber Co. v. United States, 55 Fed. Supp. 103.

Conclusion.

We respectfully submit that the judgment of the District Court should be affirmed. The evidence and the issues involved were squarely placed before Judge Peirson Hall, and every fact pertaining to the relationship between these district distributors and the bankrupt Stockholders Publishing Company, Inc., was brought out. The Court found, as a matter of fact, that these district distributors were retail dealers or middlemen between the producer, Stockholders Publishing Co., Inc., and the ultimate consumer, the readers of its papers. The District Managers stood to gain or lose, to rise or fall in proportion to the managerial skill and acumen displayed in their respective territories. If they foolishly or stupidly overordered the papers which couldn't be disposed of, they stood to lose, as they had entered into a contract whereby they had purchased these papers, and which apparently provided for no sales returns or allowances. Unfortunate credit extensions by their employees, the newsboys who

delivered papers to the homes of purchasers, were absorbed by them to the extent of the cost price to the Stockholders Publishing Company of the papers delivered and remaining unpaid for. No wages, as specifically defined in Section 1607-b of Title 26, Chapter IX, U. S. C. A., were paid to them. Withholding tax was not levied on them through the medium of the Stockholders Publishing Company, Inc., for the very good reason that withholding their future profits from the resale of newspapers would be impossible.

We respectfully submit that not only is the finding of Judge Hall supported by substantial evidence, but there is really no evidence to the contrary and the judgments should be affirmed.

Dated: June 24, 1955.

CRAIG, WELLER & LAUGHARN,
By THOMAS S. TOBIN,
Attorneys for Appellee.

THOMAS S. TOBIN,
Of Counsel.

No. 14650

United States
Court of Appeals
for the Ninth Circuit.

GENERAL CASUALTY COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

SCHOOL DISTRICT No. 5, BAKER COUNTY, STATE OF OREGON, ex rel. S. C. LYONS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—3-25-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

JUSTIN N. REINHARDT,
Corbett Building,
Portland 4, Oregon,

For Appellant.

DUNN and JACKSON,
AUSTIN DUNN,
WM. L. JACKSON,
Baker State Bank Bldg.,
Baker, Oregon,

For Appellee.

United States District Court
For the District of Oregon

Civil No. 7067

SCHOOL DISTICT No. 5, BAKER COUNTY, STATE OF OREGON, ex rel., S. C. LYONS,

Plantiffs,

vs.

GENERAL CASUALTY COMPANY OF AMERICA, a Corporation, and JAMES LUNDGREN Doing Business as PACIFIC CONSTRUCTION COMPANY,

Defendants.

PRE-TRIAL ORDER

This matter came on regularly to be heard this 26th day of October, 1953, at Pendleton, Oregon, before the Honorable James Alger Fee, Chief Judge of the above entitled Court, the relator, C. S. Lyons, appeared by Austin Dunn and William L. Jackson, his attorneys, and the defendant, General Casualty Company of America, a corporation, appeared by Justin N. Reinhardt, its attorney, and the following proceedings were had to wit:

Agreed Facts

I.

The action is commenced pursuant to Chapter 324, Oregon Laws of 1945, by School District No. 5 of Baker County, Oregon, for the use and benefit

and upon the relation of S. C. Lyons; both defendants are non-residents of Oregon and the amount involved is in excess of $3,000.00, exclusive of interest and costs; the defendant, General Casualty Company of America, is a corporation of Washington, doing business in Oregon and having therein a statutory attorney in fact; the defendant, James Lundgren, is a resident of Washington and has been doing business in Oregon under the name of Pacific Construction Company; that defendant, James Lundgren, has not been served with process and is not appearing herein.

II.

On August 7, 1950, defendant, James Lundgren, as Pacific Construction Company, entered into a written contract with School District No. 5, Baker County, Oregon, for construction of a high school and shop building, and on September 29, 1950, entered into a further contract with said School District for construction of a swimming pool and bath house in connection with said high school.

III.

Upon entering into said contract of August 7, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a written undertaking. Upon entering into the said contract of September 29, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the

School District a further written undertaking in the same identical form except as to the amount of the undertaking involved therein, a copy of which is attached to this Pre-Trial Order and by this reference made a part hereof.

IV.

That the relator furnished the defendant, Lundgren, at Lundgren's instance and request, labor, materials and sheet metal work which was used in the construction of said high school and shop building and the swimming pool and bath house in connection with said high school, and, that the said defendant, Lundgren, paid the relator the sum of $10,780.60.

V.

That relator paid his employees at the rate of $1.75 per hour and that his only employees used on the Baker high school and swimming pool were named Griffith, Gilkey and Bumgardner.

VI.

That the time submitted for the employees includes one hour each way for travel time, except on two occasions when relator and his employee, Griffith, were delayed by snow, and on each occasion, the travel time charged amounted to three hours each.

Relators Contention

I.

The relator contends that for labor, materials and sheet metal work furnished, all at the instance and

request of the defendant, Lundgren, there became and is past due, owing and unpaid to relator the sum of $3,999.58, after allowing defendants all just credits and off-sets, with interest on said sum of $3,999.58 at the rate of six per cent per annum from the 10th day of July, 1952, until paid.

II.

Relator further contends that under the provision of Chapter 324, Oregon Laws of 1945, and the terms ofthe bonds attached to this Pre-Trial Order, the said sums due and owing from the defendant, James Lundgren, are also due and owing from the General Casualty Company of America, and that the said Defendant, General Casualty Company of America, is also liable, together with the defendant, James Lundgren, to the relator for a reasonable attorney fee for the institution and prosecution of this suit, and that the sum of $1,000.00 is a reasonable attorney fee to be allowed and awarded to the relator herein.

III.

Relator contends that he was employed by the defendant, James Lundgren, to furnish the sheet metal work on the Baker high school and swimming pool on or about November 1, 1951; that the defendant, Lundgren, agreed to reimburse the relator for all material used in connection with said work at cost, plus twenty per cent; that defendant, Lundgren, agreed to reimburse the relator for freight charges on material other than between Baker and

La Grande; defendant, Lundgren, further agreed to pay relator the sum of ten cents per mile per trip between Baker and La Grande; defendant, Lundgren, further agreed to pay for labor performed by relator on said Baker high school and swimming pool at the rate of $4.50 per hour for relator's labor and at the rate of $3.75 per hour for relator's employees including travel time.

IV.

Relator contends that under the terms of his agreement with defendant, Lundgren, relator furnished materials in the cost of $4,464.52 and that 20 per cent thereof is $892.90; that the freight paid by relator other than between Baker and La Grande was in the sum of $133.39; that the distance between Baker and La Grande at the said time was 50 miles one way and 100 miles round trip; that relator made 52 round trips between Baker and La Grande hauling men and materials, and that the total sum due and owing from defendant, Lundgren, on account thereof is $520.00; that 877½ hours was performed by relator at the rate of $4.50 per hour; and 1285½ hours were performed by relator's employees at the rate of $3.75 per hour, all of said hours being worked by relator and his employees on or between November 6, 1951, and July 3, 1952.

All of the foregoing contentions the defendant denies.

Defendant's Contention

I.

The fair and reasonable value of the labor and material furnished by the relator to the defendant, Lundgren, is not in excess of $10,780.60. The defendant is not indebted to the relator in any sum whatever.

II.

Relator is not entitled to recover any attorney fee.

III.

The amount claimed by relator for attorney fee is not reasonable.

Issues of Fact to be Determined by the Court

I.

Was there an agreement between the parties. If so, what was it?

II.

What labor and materials did the relator furnish to defendant, Lundgren, at his request?

III.

What was their reasonable value?

IV.

Is Relator entitled to recover an attorney fee? If so, in what amount?

Conclusion

This pre-trial order supersedes the pleadings in this case and is approved by the parties and their attorneys. The pleadings now pass out of the case.

The foregoing pre-trial order incorporates all the issues of law and fact to be tried and determined and is approved by the attorneys and the Court. It shall not be amended after signature except by consent of the parties or by the Court to prevent manifest injustice.

/s/ JAMES ALGER FEE,
Chief Judge, United States District Court for the District of Oregon.

Dated at Portland, Oregon, this 26th day of October, 1953.

[Endorsed]: Filed October 26, 1953.

[Title of District Court and Cause.]

MEMORANDUM

March 29, 1954

James Alger Fee, Chief Judge:

Relator furnished materials to defendant at an agreed price of cost plus twenty per cent, with the exception of certain doors which were furnished at the rate of cost plus ten per cent. The amount to which relator is entitled on account of materials is $5,117.82.

Relator furnished labor to defendant at the rate of 774.5 hours of his own time for $4.50 an hour and 1,169 hours of his employees' time at $3.75 an hour. The amount to which relator is entitled on account of labor furnished is $7,869.00.

In addition, relator is allowed $520.00 for mileage and $133.39 for freight charges.

Defendant is entitled to credits against the sum owing to plaintiff in the amount of $10,780.60.

Relator is entitled to reasonable attorneys' fees in the amount of $1,000.00.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried before the Honorable James Alger Fee, Chief Judge of the above-entitled Court, without the intervention of a jury, on the 26th, 27th, and 28th days of October, 1953, the relator, S. C. Lyons, appearing in person and by his Attorneys, Austin Dunn and William L. Jackson, the Defendant, General Casualty Company of America, a corporation, appearing by Justin N. Reinhardt, its Attorney, and the Court having heard the evidence of the parties and having considered the exhibits offered and received in evidence, and having taken this action under advisement, and being now fully advised, hereby makes and enters the following:

Findings of Fact

I.

The action is commenced pursuant to Chapter 324, Oregon Laws of 1945, by School District No. 5

of Baker County, Oregon, for the use and benefit and upon the relation of S. C. Lyons; both defendants are non-residents of Oregon and the amount involved is in excess of $3,000.00, exclusive of interest and costs; the defendant, General Casualty Company of America, is a corporation of Washington, doing business in Oregon and having therein a statutory attorney in fact; the defendant, James Lundgren, is a resident of Washington and has been doing business in Oregon under the name of Pacific Construction Company; that defendant, James Lundgren, has not been served with process and is not appearing herein.

II.

On August 7, 1950, defendant, James Lundgren, as Pacific Construction Company, entered into a written contract with School District No. 5, Baker County, Oregon, for construction of a high school and shop building, and on September 29, 1950, entered into a further contract with said School District for construction of a swimming pool and bath house in connection with said high school.

III.

Upon entering into said contract of August 7, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a written undertaking, wherein and whereby James Lundgren, an individual doing business as Pacific Construction Company, principal, and General Casualty Company of America, a Washington

corporation, surety, were held and firmly bound unto School District No. 5, Baker County, Oregon, owner, in the sum of $975,100.00 for the payment of which said principal and surety bound themselves, their legal representatives, successors and assigns, jointly and severally, that the principal would faithfully perform the contract with owner and pay all persons who had furnished labor or material for use in or about the improvement and would indemnify and save harmless the owner from all cost and damage by reason of principals' default or failure so to do, and that all persons who had furnished labor or material for use in or about the improvements should have a direct right of action under the bond. Upon entering into the said contract of September 29, 1950, the defendant, James Lundgren, and the defendant, General Casualty Company of America, signed and delivered to the School District a further written undertaking in the same identical form except as to the amount of the undertaking involved therein, which was in the sum of $97,450.00.

IV.

Between on or about November 1, 1951, and July 10, 1952, the relator furnished the defendant, Lundgren, at Lundgren's instance and request, labor, materials and sheet metal work which was used in the construction of said high school and shop building and the swimming pool and bath house in connection with said high school, and, that the said defendant, Lundgren, paid the relator the sum of $10,780.60.

V.

That realtor furnished materials to defendant, James Lundgren, doing business as Pacific Construction Company, at an agreed price of cost plus twenty per cent (20%), with the exception of certain doors which were furnished at the rate of cost plus ten per cent (10%). The amount to which relator is entitled on account of materials is $5,117.82. That relator furnished labor to defendant, James Lundgren, at the rate of 774.5 hours of his own time for $4.50 an hour, and 1,169 hours of his employees' time at $3.75 an hour. The amount to which relator is entitled on account of labor furnished is $7,869.00. That defendant, Lundgren, agreed to reimburse the relator for freight charges on material other than between Baker and La Grande, and that relator is entitled to $133.39 for freight charges. That defendant, Lundgren, agreed to pay relator mileage for trips between relator's shop in La Grande, and the site of the construction in Baker, Oregon, and that relator is entitled to $520.00 for mileage. That relator is entitled to reasonable Attorneys' fees in the amount of $1,000.00.

VI.

That under the provisions of Chapter 324, Oregon Laws of 1945, and the terms of the bonds the sums due and owing from the defendant, James Lundgren, to relator herein are also due and owing from the General Casualty Company of America, a corporation.

From the foregoing Findings of Fact, the Court hereby makes and enters the following:

Conclusions of Law

1. The relator is a person furnishing labor and material for use in and about the construction of the High School building of the Plaintiff, School District No. 5, Baker County, Oregon, a public improvement within the meaning of the bond furnished by the defendant, General Casualty Company of America, to said School District, and, as such, is entitled to enforce the provisions of said bond by this action for his own use and benefit.

2. By the provisions of Chapter 324, Oregon Laws, 1945, the relator is entitled to judgment against the defendant, General Casualty Company of America, for Attorneys' fees in addition to the amount recovered for labor and material furnished.

3. By virtue of the furnishing of the labor and material specified in the foregoing Findings, between the dates specified, there became and was and now is past due, owing and unpaid from the defendant, General Casualty Company of America, to the relator in this action the sum of $2,859.61, and interest at the rate of 6% per annum from the 10th day of July, 1952, until paid, and the further sum of $1,000.00 reasonable Attorneys' fees, and the costs of the relator herein incurred.

Let Judgment be entered accordingly.

Dated this 18th day of December, 1954.

/s/ JAMES ALGER FEE,
United States Circuit Judge.

Affidavit of Mail attached.

[Endorsed]: Filed December 18, 1954.

In the United States District Court
for the District of Oregon

Civil No. 7067

SCHOOL DISTRICT No. 5, BAKER COUNTY, STATE OF OREGON, ex rel., S. C. LYONS,

Plaintiffs,

vs.

GENERAL CASUALTY COMPANY OF AMERICA, a Corporation, and JAMES LUNDGREN, Doing Business as PACIFIC CONSTRUCTION COMPANY,

Defendants.

JUDGMENT

This action having been tried before the Honorable James Alger Fee, Chief Judge of the above-entitled court, without intervention of a jury, the relator appearing in person and by his Attorneys, Austin Dunn and William L. Jackson, and the Defendant, General Casualty Company of America, appearing by Justin N. Reinhardt, its attorney, and the Court having heard the evidence of the parties and having considered the evidence and the exhibits offered and received in evidence, and having made and entered Findings of Fact and Conclusions of Law, and being now fully advised;

Now, Therefore, based upon the Findings of Fact and Conclusions of Law heretofore entered in this cause, it is hereby Considered, Ordered and Ad-

judged that the Plaintiffs do now have and recover of and from the defendant, General Casualty Company of America, a corporation, the sum of $2,859.61, with interest thereon at the rate of 6% per annum from the 10th day of July, 1952, until paid, and the further sum of $1,000.00 reasonable attorneys' fees, and the costs and disbursements incurred by the Plaintiffs in this action and taxed in the sum of $178.00, for all of which said sums and interest let execution issue.

Entered this 18th day of December, 1954.

/s/ JAMES ALGER FEE,
United States Circuit Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 18, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To School District #5, Baker County, Oregon; the Relator S. C. Lyons, and His Attorneys, Dunn & Jackson:

Notice Is Hereby Given that General Casualty Company, one of the defendants herein and the appellant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the judgment

entered in this action on December 18, 1954, and from each and every part and the whole thereof.

Dated: December 27, 1954.

/s/ JUSTIN N. REINHARDT,
Attorney for Appellant-Defendant, General Casualty Company of America.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk, United States District Court for the District of Oregon, do hereby certify that the foregoing documents, consisting of Pretrial Order, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal, Designation of Record on Appeal, Order to Transmit Exhibits, Amended and Supplemental Designation of Record, and transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7067, in which General Casualty Company of America is one of the defendants and the appellant, and School District #5, Baker County, State of Oregon, ex rel. S. C. Lyons, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed

by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is $5.00, and that the same has been paid by the appellant.

I further certify that there is enclosed a copy of Memorandum of Judge James Alger Fee (not filed) and the reporter's transcript dated October 28, 1953, and one dated October 26-28, 1953.

I further certify that there is being forwarded under separate cover Exhibits 1, 8-A, 9-A, A-1 and B, 12, 13, 14-A-1 and 2, 14-A 3, 4, 5, 6, 7, 8, 14-B, 14-C, 15, 16, 17, 18-A, B and C, 19-A and B, 21, 24 and 25.

I further certify that Exhibits 20-A and 20-B, both blueprints, will be forwarded at a later date by Mr. Justin N. Reinhardt, Attorney for the Appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 9th day of February, 1955.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14,650. United States Court of Appeals for the Ninth Circuit. General Casualty Company of America, a Corporation, Appellant, vs. School District No. 5, Baker County, State of Oregon, ex rel. S. C. Lyons, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Oregon.

Filed February 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14650

GENERAL CASUALTY COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

SCHOOL DISTRICT No. 5, BAKER COUNTY, STATE OF OREGON, ex rel. S. C. LYONS,

Respondent.

STATEMENT OF POINTS TO BE RELIED UPON

Appellant, General Casualty Company of America, a corporation, proposes on its appeal to the United States Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. The findings of the District Court as to attorney fees, the amount of time for which Relator is entitled to be compensated, and the rate of such compensation are not within the issues submitted, are not supported by, but are clearly contrary to, the evidence and do not support the judgment rendered.

2. The District Court's award of $1,000 attorney fees is contrary to the stipulation (R.) that $1,000 would be a reasonable attorney fee if Relator should recover $5,303.79, the amount he originally claimed, not 54 per cent thereof, which is what the Court allowed. The amount allowed is excessive, particularly in view of said stipulation.

3. There is no evidence to support the finding of the District Court that Relator furnished a certain number of hours at certain rates amounting in all to $7,869.

No evidence of time spent was offered except the Relator's own records (Exhibits 9-A, 1-A and B, 14-A, B, and C, 15, 19-A and 25). Hence the credibility of witnesses is not involved.

The obvious mutual contradiction among Relator's records led to their complete rejection by the trial court, which found a lower number of hours than appears in any of them. As a result, there is no evidence as to any amount of time on which the Court could have based this finding. But if there were a basis it was not disclosed by the District Court as required by Rule 52 (a) F.R.C.P.

4. The District Court did not disclose the basis of its finding as to rates. Moreover, it did not disclose whether this was an agreed price or reasonable value, although the Pretrial Order explicitly framed that issue for decision by the District Court. Its finding as to rates is contrary to the clear weight of the evidence.

5. The findings of the District Court are clearly erroneous and should be reversed.

Dated February 15, 1955.

/s/ JUSTIN N. REINHARDT,
Attorney for Appellant.

[Endorsed]: Filed February 16, 1955.

[Title of Court of Appeals and Cause.]

APPELLANT'S NARRATIVE STATEMENT OF TESTIMONY

* * *

S. C. Lyons testified as follows:

"* * * one afternoon * * * Harry Lundgren and a fellow by the name of Shearer * * * came in my shop and asked us if we would be available to complete the sheetmetal work on the Baker High School, as the sheetmetal man hadn't kept up with the work and he wasn't on the job, and they had to have it finished, as winter was setting in. And I said Yes, I would be able to take care of that. * * * and the next morning * * * I went down to Baker. When I got down there I met Mr. Lundgren, Mr. Harry Lundgren, and he says, 'Well,' he says, 'you are too late to do the job.' * * * And I said, 'Well, I don't think that is very nice, just call me down here on a goose-chase.' He says, 'Wait a minute.' He says, 'We have got a smoke vent we have got to have built.' He says, 'Will you build that?' I says, 'Well, it is made out of metal. I imagine we can build it.' He says, 'Well, here it is,' and he showed me the plans. He says, 'Can you build that?' I says, 'Where are the specifications for it?' Well, the specifications were very brief and the detail on the plans was very brief. He says, 'You will have to get in touch with the architects and find out how they want it built.' So I says, 'All right.' He says, 'Well, you will take care of that for us?'

He wanted to emphasize that I would take care of it. I says, 'Yes.'

"That was near the week end, and that week end I went to Portland, and I got in touch with the architects and I saw the details on it was just as brief as those that was on the plan, and they suggested I go to the underwriters to see if they had anything on that smoke vent. That was traced down that the Sperry-Winkler Company in New York built one years ago, and we found a picture of it in slight detail in the underwriters' book, and I made a little sketch from that, and got a mental picture of it, and I went back to the architects and told them what I was going to do. And they says, 'We will check on it on your job as you progress with it.'

"So I went and ordered some materials for the smoke vent to be built and had it shipped to La Grande, and I went back and we started work on it. We was working on that, oh, it was about two weeks after the first contact with the Pacific Construction Company, that I got a telephone call one day, and he asked if I would be available to finish the rest of the sheetmetal work on the Baker High School, as Parker was unable to get the materials. And I said, 'Yes.' * * * So I went to Baker that afternoon and measured up some of the stuff that was in dire need, because winter was setting in. * * * We went to work on it, and near the end of November I went to Mr. Lundgren, Harry Lundgren, and I says, 'What about some money?' * * * He says, 'You just send a bill to the Pacific Con-

struction and they will take care of that.' So we had purchased materials for the smoke vent and the flashings for the roof and other odds and ends, and I had labor to pay, so I took a bill down to Harry Lundgren, and he was in the hotel—he was sick at that time—and he okeyed it, and I sent it in to the Pacific Construction Company. I got a letter from Pacific Construction Company stating that they would like more definite our billing on the job, how it was done, because I just put a lump sum down for so much material and that. So we itemized it out and sent the bill back, and I told them in that letter, Exhibit 14-A-2, just what we was going to charge; that I would be unable to give him a bid on the job, as it was pretty well chopped up, and there was too many odds and ends to be finished up there to give him an accurate bid on the job. And he says, 'Well, I don't expect you to give a bid on it.' He says, 'All I want to do is get the job done.' ''

(Exhibit 14-A-2 was received in evidence.)

Q. (By Mr. Dunn): This letter sets out the terms under which you had labored on the job and were continuing to labor?

A. That is right. * * *

The Witness: ''I sent that letter to the Pacific Construction Company with the expectation of getting a check in return for some of the money I had put into the job. I didn't get it, so circumstances was bad, and so I went down to the Pacific Construction Company and I told them I needed some

money. 'Well,' he says, 'I am expecting some money in.' But he did give me a check for $800 at that time. And then I says, 'Now, on that letter that I wrote to you,' I said, 'the terms that I specified in there'—he says, 'Oh, yes. That is fine and dandy.' He says, 'That is all right. I want to get the job done.' So I took my $800 and went back."

Lyons testified the union scale for labor at that time was $2.30 per hour; that some contractors were charging $4.50 per hour for their employees as well as themselves but Lyons charged $4.50 an hour for himself and $3.75 for his employees.

Q. When was the first objection raised to your statement?

A. When I presented him the bill for the hollow metal doors. * * * "And Mr. Lundgren complained about the bill. In our agreement it had been 20 per cent on the materials. He says, 'Here, why should I pay you 20 per cent for ordering these doors when I could have done it right here?' I said, 'Well,' I says, 'sooner than have any hard feelings I will just cut that commission right in half,' and I gave him a credit on his statement for just half of my commission on those hollow metal doors. 'Well,' he says, 'that is all right.' * * *

Q. Was there an objection as to the amount of labor you were performing or the materials you were furnishing? A. None whatsoever."

Lyons testified that the distance between Baker and La Grande was fifty miles; that in his charge for labor he included time spent from the time he or his employees left La Grande until they returned

plus mileage at the rate of ten cents a mile. Mileage for 58 such trips charged at $10.00 each was shown on Exhibit 19-A and Exhibit 21, which was received as a brief and not as evidence.

On cross-examination Lyons testified that under his method of billing, the charge for each of these 58 trips between La Grande and Baker amounted to $10.00 for mileage, two hours of his own time at $4.50 an hour, or $9.00, two hours of his men's time at $3.75 or $7.50, and when a second man was involved, an additional $7.50, or a total of $26.50, or $34.00 per trip. He testified that he never discussed with anyone whether he should operate on that basis or keep his crew in Baker on subsistence at $6.50 a day per man.

On cross-examination, Lyons testified that Mr. Lundgren approved the terms of Exhibit 14-A-2 at the time he paid Lyons the $800 mentioned in his direct testimony (p. 8) on Lyons' visit to Portland after sending Lundgren Exhibit 14-A-2. Then by reference to his bank book, Exhibit 12, he testified that the $800 payment was made December 12, 1951. When it was called to his attention that Exhibit 14-A-2 was dated December 31, he testified: "Well, there is a mis-date on this letter, then," and suggested that the letter should have been dated November 31 instead of December 31 because "It was sent previous to the time I got the $800."
* * *

But immediately thereafter Lyons testified:

Q. And it was after that letter of December 3rd, 1951, from Mr. Lundgren to you (Exhibit 14-A-1)

that you sent him Exhibit 14-A-2, which is your letter of December 31st? A. Yes, sir.

Lyons testified again that Lundgren made no objection to his billings until after February, 1952, when he billed for the hollow metal doors. Lyons' attention was called to Lundgren's letter of January 8, 1952 (Exhibit 18-B), which expressed objections to the bill of December 31, Exhibit 14-A-2. He then testified:

A. No, it was after I got the January 8th letter (Exhibit 18-B) I went down to Mr. Lundgren and talked to him, and I had explained the agreement of December 31st, and he said it was all right. * * *

Q. That is the conversation which this morning you placed at the time of the $800 payment?

A. That is right, but that was a mistake on my part.

With respect to his testimony that the going rate for labor in La Grande and Baker was $4.50 an hour, Lyons testified:

Q. Does that mean that that was the going rate to repair a stove in somebody's home?

A. It was the going rate for any kind of job we took. * * *

Lyons testified most of his work is contract work; that during 1951 or 1952 he had no other job of the size of this one and that the largest job outside of this one that he had during 1951 or 1952 was a heating plant in Union, Oregon, for which his total bill was $1,735. This line of questioning was concluded as follows:

Q. Do you know of any other sheetmetal job in Baker or La Grande which ran to a total bill of more than $5,000? A. No, sir.

Q. What is the largest sheetmetal job that was done, to your knowledge, in Baker or La Grande?

Mr. Dunn: Your Honor, we object to the materiality of this line of questioning. I can't see what the size of another job has to do with this particular job.

The Court: I think it has gone far enough.

Lyons described the smoke vent (Exhibit 20-A, page 15) for which he billed Lundgren $3,914.51 (Exhibit 14-C) as follows: A rectangular structure 16 feet 10 inches long about 12 feet wide, 8 feet high, constructed of channel iron and angle iron, covered by sheet metal. The structure has no floor but the sides rest on a curbing above the roof of the school building and are fastened to the curbing with angle iron. The sides flare out so that the dimensions at the top are greater than the dimensions at the bottom. It has a gable roof made of twenty-gauge galvanized sheet iron, lined with fir-tex. The walls are made of two-inch by one-inch channel and angle iron covered with galvanized sheet iron. Attached to the top of these by horizontal hinges and to the roof by fusible links are fire doors made of two-ply shiplap, tin clad, with ribs going up the sides vertically. Between the top of the sheets and the roof are frames that run to hold the roof when the doors are open, and when the doors are closed they are flush with these frames. All this was specially fabricated by the relator at

his shop at La Grande, put together by him once there, taken apart, shipped to Baker and there assembled and installed on the top of the school building.

Lyons was cross-examined in detail on the items in his bills, and discrepancies between them and the supporting documents were pointed out to him. This extends over thirty-five pages of record, during the course of which he acknowledged numerous errors, many of which he said he had known about before signing the Pretrial Order. Finally, the following took place:

Q. May I just see that exhibit for a moment. According to my calculations, those figures which you have read total $1,171.33, as compared to your cost plus 20 per cent of $1,135.

A. I knew that discrepancy.

Q. You did? A. Yes.

Q. You knew, then, about the discrepancy in the tin-plate charges and about the discrepancy in the aluminum charges?

A. Yes, sir. I discovered that with Mr. Murphy, when he was here.

Q. I see. Now, in this litigation you have made no adjustments for those mistakes?

A. I have never had a chance to. I have never had a chance to.

Q. Do you wish now, Mr. Lyons, to report to the Court any other mistakes which you have discovered which you want the Court to make allowance for in connection with this case?

A. How is that?

Q. You say you knew about this tin-plate mistake and the aluminum mistake. Are there any others that you want to tell the Court about and save us time here?

A. Well, I don't recall anything right now.

Q. Those are the only errors that you have discovered, or are there others?

A. I imagine there are others, but I don't recall them right now.

The Court: I am not quite sure about the fact that you haven't had a chance to make these corrections. A pre-trial conference was held in this case. You are supposed to represent the true state of facts. Why haven't you had a chance to change it?

The Witness: I mean when we was dealing with Mr. Lundgren.

The Court: Why are you admitting here on the stand that there are mistakes in this account that you knew about before the case was coming on for trial? Those are supposed to be straightened out before you ever get here.

Mr. Dunn: May it please the Court, the over-all charges in this matter actually total more than the amount that we prayed for. We didn't adjust down to it, feeling that we would be bound by the amount that we prayed for of $5,303. Actually, the total charges will come to more than that, when the whole thing is totaled.

The Court ordered a recess. During the recess, the amount claimed by the relator was reduced by him from $5,303.79 to $3,999.58, and immediately

following the recess the relator offered Exhibit 25, which was received in evidence as his summary of his charges against the defendant Lundgren.

(Plaintiff rested.)

Harold Hendricks was called by the defendant and testified that he has been in the sheet metal business in Pendleton continuously since 1933, except for three years when he did sheet metal work in the armed services, and has owned his own business, named Thews Sheet Metal Inc., since 1947. He testified that he is familiar with practices and rates and charges for sheet metal work in the area of Pendleton, Baker and La Grande; that a reasonable price for the smoke vent built by the relator between November, 1951, and the spring of 1952 would have been $1,200.00.

Q. In other words, that would be the price for fabricating the structure, putting it together, and placing it on the roof of the building?

A. That is right.

Q. Now let me ask you this: As to your procedure in carrying out such an order, would it be your procedure to fabricate the parts of this structure in your shop and then put them together to see if they fit, and so on, and then take it apart for transporting, and take it down to Baker and put it up on the structure? Is that in general the way you would handle the job?

A. Yes, that is in general.

Q. Do you have any estimate of the amount of time that would be required for this job that we are

talking about, and, if you can, break that down between shop time and Baker time.

A. Well, I would say that it would take approximately, oh, ten 8-hour days to construct the thing in the shop, and approximately the same length of time on the job.

Q. That would require travel between Pendleton and Baker?

A. Well, it would require one trip to Baker and one trip back. * * *

A. The men would stay in Baker until the job was completed and then return.

Q. How have you calculated in your estimate provision for the cost of that trip and the time that the men would spend there?

A. Well, we charge mileage at 10 cents a mile, and then the men receive $6.00 a day maintenance money.

Q. And that is included in this over-all figure of yours? A. That is included.

He testified that the standard method of estimating and computing charges for sheet metal in the area of Baker, La Grande and Pendleton during the period 1951-2 was to take the cost of material, the cost of our labor, plus 7% for labor insurance, 20% for overhead and a percentage for profit, which would be fixed by negotiation at 15% or 20% plus mileage and maintenance at $6.00 a day. Using that method, he arrived at a figure of $1,200.00 for the smoke vent, and that is the method that would normally be used in computing the charges for such

a job. But "if it is shop work, why, then we have a flat hourly rate that we charge," which was $4.50 in 1951 and 1952.

Q. That is the rate that you charge, you say, for small custom jobs? A. Job work, yes.

Q. But that is not the method that would be used, then, in billing for the kind of a job that we are talking about like this smoke vent?

A. No, no. At least we wouldn't do it that way.

Q. And the reason for that is what?

A. We are getting a little better deal than on job work, for the very reason that it is the small jobs where a man moves from job to job, and he loses time, where if he is on a big job, why, he is right there and there is no lost motion.

Q. Now, this job rate figure which you mentioned of $4.50 or $4.65, as the case might be, is that geared at all to the cost of your labor?

A. Yes.

Q. What labor cost is that $4.50 figure based on?

A. That was in '52, wasn't it? I said $4.50 would have been 1952. It was about $2.55, somewhere along there.

Q. In other words, when your labor cost was $2.55 an hour, your shop work rate was $4.50 an hour? A. That is right.

Q. If your labor cost were lower, would your shop work rate be lower?

A. That is right. It would go lower.

Q. In general in the same proportion?

A. Yes. * * *

Q. Now let me ask you this: In the figure that

you have given on this hypothetical smoke vent, can you state what proportion of that is labor and what proportion of that is material, approximately?

A. Well, that would be, I would say, awful close to a 50-50 proposition. You would have almost as much material in it as you would labor.* * *

Q. So far as your billing practice is concerned, is it your practice to bill at a higher rate for one of the men if there are only three men on the job?

A. No, if there is only three men on the job, they get their regular scale and it is billed that way. If there is four, and one of them is designated as foreman, he gets foreman's wages, which I believe is 25 cents an hour more. That is all taken into consideration when you are figuring the job.

On cross-examination, Mr. Hendricks was asked: If your firm had been employed to build the smoke vent, to put the ceilings in the shower rooms, do most of the flashing, and build some scuppers, goose-neck vents,do the coping and the trim, the porch flashing, swimming pool flashing and trim, and build downspouts, and all of these without a contract, on labor and materials, you would then charge exactly the amount of hours that you put in on the job, plus your materials, plus your overhead as you have given the formula to us on your direct examination; is that correct? A. That is right.

Q. Now, the charge for yourself actively participating in the job and of your men would be $4.50 an hour under those circumstances?

A. No.

Q. What would it be?

A. I think I follow your question correctly. You would charge your labor out at a labor cost, not a $4.50-an-hour rate. Then you would have your labor and your material cost, and so on, just the same as though you were bidding the job. In other words, the contractor wants to know how much this material is, and how much labor you had, and what everything is. So you break it down so much for material and so much for labor at cost.

Q. And then you add——

A. Then you add your percentage.

Q. Which at that time was 20 per cent?

A. Well, that again raises another question. I don't know. I never found a job like that. I couldn't say. It was designated by the contractor and myself as to how much before I was going to get the job. In other words, what we call cost-plus, and it is before we ever go to work on the job we say that we will go on the job and we will do it at cost-plus-10 or cost-plus-15. So in order to break our costs down we have our labor at cost and our material at cost.

Q. Then you add your overhead?

A. Then we add our overhead, and that runs the total cost of your job. To that then you add the percentage that has been set between you and the contractor.

Q. Now, part of the work that you would do on a job of that nature would be done in your shop, taken up there and placed on the job, and part of it would be done on the job. It is 50 miles away. Under those circumstances would you travel be-

tween your job and the building, or would you go to the building and charge maintenance for your men?

A. We would go to the building and charge maintenance, because that is cheaper for the general contractor.

Q. If you had a rather lengthy period that you would have to be on the job?

A. That is right.

Q. But if it were a day here and a day there, a day of shop work and then a day on the job, you would not go to the job and charge it that way, would you?

A. No. No, because you would not leave your men sitting in La Grande with nothing to do, or Baker, or wherever you were going.

Q. Your shop work is all done in Pendleton, 50 miles away? A. Yes.

Q. And almost a daily supply was necessary. So you would go back and forth, would you not?

A. Well——

Q. Depending upon the job?

A. Depending upon the job. * * *

Mr. Lundgren was called as a witness for the defendant and testified as follows:

A. * * * On approximately November 1st my brother Harry Lundgren, Mr. Shearer, who was the previous job supervisor at Baker, or superintendent, were asked by me to contact the sheetmetal shops at La Grande and see if arrangements could not be worked out on a cost-plus basis of 10 per cent for completion of the sheetmetal. * * *

(Exhibit 14-A-1 was received in evidence.)

Lundgren then testified that he had a telephone conversation with Lyons about December 3d, "in which he was very worried about getting some money," and testified as follows:

"* * * And I believe at that time, why, I sent him $800.00. But we also discussed the terms of our agreement, which was to be cost-plus-10 per cent at that time. Now I believe finally I received a letter on December 31st of 1951 (Exhibit 14-A-2) which was in answer to my letter of December 3rd of 1951 (Exhibit 18-A). And that also finally came after a telephone call for money in which I told him I had to have a breakdown and I wouldn't pay a dime until I did, which would substantiate 10 per cent. I believe that I sent him two checks of $500 each."

(Exhibit 14-A-2 was received in evidence, and Exhibit 18-A was received in evidence as the reply to Exhibit 14-A-1, and 18-B was received in evidence and identified as Lundgren's reply to Exhibit 14-A-2.)

Lundgren then testified to several oral complaints he made to Lyons "about his method of billing and the duplications." And Exhibit 18-C dated June 17, 1952, was received in evidence. * * * He said the nature of those complaints was as to the method of billing, the price, the fact that nothing checked out. "Every place I went to do any checking, why, there seemed to be three times the material that was possible to put into the item. The hours, of course,

I had no way of checking on." * * * He testified that his estimate of what Lyon's work would cost, before he came on the job was, at the very most, $6,000. "And part of that I had put in there for a margin of safety. The smoke vent, for instance, was originally figured at nine hundred seventy-some dollars by the original contractor."

Q. In your judgment $6,000 would have been a reasonable figure for all the work that the Relator did?

A. Very much so, the original contract or the original amount of sheetmetal work—not only of the man who got the job, but substantiated by the other subfigures on the whole thing, could not be over $11,000 in the total job for the sheetmetal.

* * * And at the time that the Relator was called in to do the work that he did, approximately 70 or 75 per cent of the sheetmetal contract work had been performed * * * and almost all the material was on the job. "For instance, the gooseneck vents that there is so much talk about here we placed on the building before he ever got there. And there was an addition under them. They were taken off and set on a base. There was no individual base on them originally." * * *

Q. You are familiar generally with the normal costs and the time that should be required to do this kind of work that the Relator did?

A. Yes, ordinarily I am.

Q. In your opinion is the number of hours which the Relator claims to have spent doing this work reasonable?

A. In my opinion it is not in any way.

Q. By what margin, if you are prepared to say?

A. If his number of hours were divided by three, I would wonder.

(The Defendant rested.)

Ralph Jones was called as a witness by the plaintiff in rebuttal and testified that he had been in the construction business or in the sheetmetal business seven years and is familiar with construction costs of such a smoke vent as that on the Baker High School. He was asked:

Q. Based upon your experience and your observation of that particular vent, can you give the Court an idea as to what you think the cost of constructing that smoke vent would be?

A. Well, from what I saw of it going through construction, that would be a tough problem. Roughly—I don't know just exactly what it weighed, but I know that it was heavy, and weight would have lots to do with what it would cost to construct it.

Q. Can you answer the question as to about what your estimate of cost of that particular smoke vent would be?

A. Well, it would be pretty hard to do. I would have to do some figuring, that would be all there is to it. But, roughly, I don't think, in my opinion, that it could be built for much less than double over what the man before—it would run a little more than that—over what the other party said. I think it would run close to anyway thirty-six

hundred. But that is an estimate. I wouldn't build it for that, from what I saw of the smoke vent.

Q. Are you familiar with the charges made in this area for the labor of a shopowner and his employees? A. Yes.

Q. Assuming a job such as building a schoolhouse in a town 50 miles away, 50 miles from La Grande to Baker, and the necessity for making parts, doing part of the metal work in the shop and part of it on the job, and running back and forth between there, taking all of that into consideration, what method would you use in charging for such a job if there were no bid on it?

A. If I were doing it myself?

Q. Yes. If you had it for time and material, what would you charge?

A. My charges would be $4.50 an hour for two men.

Q. That is, you would charge $4.50 for yourself——

A. That is right, for myself and for my men.

Q. And $4.50 for your man.

A. And I would charge mileage. On my light truck I charge 10 cents. On my one-ton truck I charge 15 cents.

Q. Was that the charge that you would have made from November of 1951 to the middle of July, 1952? A. Yes, sir.

Mr. Lyons was recalled as a witness, in rebuttal, and testified as follows:

Q. You heard Mr. Lundgren's testimony, Mr.

Lyons, generally. Did you have any telephone conversations with Mr. Lundgren?

A. Yes, I have.

Q. In any telephone conversation did he object to your labor or material charges?

A. No, sir; except for clarification. He says it wasn't clear to him.

Q. Did he object to the amounts? A. No.

Q. Did you ever tell him that there would be no charge for travel time? A. No, sir.

Q. Did you ever agree with him that your contract would be your cost plus 10 per cent?

A. No, sir.

Q. Have you computed it and had it always been right from the start your cost plus 20 per cent? A. Yes, sir.

Q. That is, on material? A. Yes, sir.

Q. You charged no 20 per cent on the labor?

A. No, sir.

On recross-examination, he was handed his letter to Lundgren, Exhibit 14-A-2, in which he said:

"Enclosed are cost sheets for sheetmetal work on Baker High School." He testified that $3.75 for his employees' time was not his cost but he put it in his letter, Exhibit 14-A-2, "because of my overhead and all that."

Q. Does your overhead cost you $2.00 per hour per man?

A. It comes pretty close to that.

Q. How do you figure that, Mr. Lyons?

A. Well, sir, you take one man or two men. All right. We work eight or nine hours a day. You

make $2.00 an hour on each man—say one man, which we was operating practically all the time, except my time. That is $18.00 a day. You can't pay rent, can't pay office help, and take any depreciation or have anything left for your investment on $18.00 a day.

Q. Did you ever figure your overhead, Mr. Lyons?

A. I have never had a business big enough that I had to really worry about that, because I always did a certain amount of work myself, too.

Q. So you don't know what your overhead is, do you? A. No, sir.

Q. You don't know whether it is $2.00 an hour a man or $20.00 an hour a man or two cents an hour a man, do you?

A. I know it costs to open a business and keep the business open.

Q. When you told Mr. Lundgren that it cost you $3.75 an hour for your men, you didn't know whether it did or not, did you?

A. Well, I have been in business for a long time, and I have kept costs that way, and I know you have to charge that to show any reasonable profit at all on a job.

Q. In other words, that includes profit, doesn't it? A. That is right.

Q. Yes.

A. I figure when I hire a man I buy so much merchandise, and I must sell that man's labor for a profit.

Q. And that profit is included in this $3.75 an hour, isn't it? A. Yes, sir.

Q. How much profit is included in the $3.75 an hour?

A. Over a year's time you would find that it would be less than 20 per cent.

Q. In other words, 75 cents of that is profit, at least? A. It could be.

Q. But that is just an estimate?

A. That is right.

Q. Because you don't know what your overhead is?

A. That fluctuates quite a bit at that. Over a year's time I can tell you just what it was.

* * * He testified that he started in business in La Grande in June, 1951, and was in the process of moving to La Grande from Portland and actually operated both shops during 1951 and 1952. He then testified as follows:

Q. So that your overhead, even if you knew what it was, would not have been a normal overhead in those two years, would it?

A. Yes, I would say it would still be a normal overhead.

Q. Now, reading on in that letter of December 31st, 1951, you state, "My net on the complete job is slightly less than 10 per cent."

* * *

Q. How did you know?

A. Well, I took my costs right at that time.

Q. You knew right then and there——* * *

A. I took and referred back to my past records.

Q. How did you know in December, 1951, what this complete job was going to amount to?

A. I didn't know what it was going to amount to.

Q. You did not? A. No, sir.

Q. Then you could not honestly say at that time that your net on the complete job was slightly less than 10 per cent, could you? A. No, sir.

Q. But you said it, didn't you?

A. I said my complete net—my net on the complete job is slightly less than 10 per cent to that time or date. That is just what it was running.

Q. How did you know?

A. Because I figured up the materials that I purchased and everything, due to the fact that up to that time we had purchased materials for the smoke vent, aluminum for the building, and everything, but we had no labor in it to speak of at that time, not enough to take care of the job.

Q. At December 31st, 1952, you had practically no labor?

A. We had labor in there, but we had bought more material than we had labor.

Q. Now, referring to that Exhibit 14-A-2 which you have in front of you, how much is on there for material?

A. There is $437.89, $230.88, $274.13, and $174.13 on the exhaust vent.

Q. That is all?

A. That is all I see right here.

Q. That is about eleven hundred dollars, isn't it?

A. Yes.

Q. How much is that total bill?

A. $3,322.94.

Q. So one-third of that bill is for material and the rest of it is for labor?

A. I beg your pardon there. We had purchased up almost enough aluminum to do the whole job. And Mr. Lundgren said I couldn't charge for the aluminum until it was delivered on the job. He says he couldn't collect on the materials until they was on the job, he says, whether they was just delivered there or not.

Q. I am referring you now to your previous testimony which you gave just prior to this, in which you said that you knew your profit was less than 10 per cent because you had almost all the material in this bill and practically no labor. Actually, you had twice as much labor in this bill as you had material, didn't you?

A. On this bill here, yes.

Q. Yes. And this is the bill you were talking about, isn't it? A. That is right, yes.

Q. And this is the bill that you said your net was slightly less than 10 per cent? A. Yes.

Q. And you were sure of it because most of it was material. Most of it is not material, is it?

A. Well, we had purchased material. It was there.

Q. That is not on this bill, is it?

A. That is not on this bill.

Q. And you didn't know that your net was less than 10 per cent?

A. But your inventory is still included in your overhead.

Q. Oh, you were including inventory in overhead? A. Yes.

Q. Then that is an explanation of how you can arrive at a figure of 10 per cent, if you include inventory in overhead?

The Court: I think, Counsel, you could point out these discrepancies just as well by brief as by examining the witness.

Mr. Reinhardt: I would like to ask just one more question, your Honor.

The Court: All right.

Q. (By Mr. Reinhardt): Now, you deny having made an agreement with Mr. Lundgren to do this job at a 10-per-cent profit, do you?

A. That is right.

Q. In view of that denial, why did you refer to any 10-per-cent figure in this letter of December 31st, 1951?

A. I said it is running slightly less than 10 per cent.

Q. That had nothing to do with any deal to do this job for 10 per cent?

A. Absolutely not, because I couldn't do the job for 10 per cent net profit.

Q. Do you make 10 per cent on your business?

A. Yes. I sure haven't done it the last two years, though.

Q. Beg pardon?

A. I haven't done it the last two years.

Q. You have not? A. No, sir.

Q. How much have you made on your business in the last two years?

A. In 1951 I went eight hundred dollars in the hole. Last year—I have two children and my wife as dependents, and I paid less than $100 for income tax. That can be criticized any way you want to.

Q. That was last year?

A. That was last year, '52.

Q. What about 1953?

A. 1953, I haven't checked it yet.

Q. You mean you have to check to determine your rate of profit?

A. Yes, sir. This is a little different business than a merchandise store. We have jobs——

Q. You didn't have to check in '51 or '52, though, to find your overhead cost? You knew that?

A. I knew it from previous experience, yes.

Mr. Reinhardt: That is all.

During the recess referred to on page 10 of this abbreviated record, the Relator revised his Contention IV appearing on page 5 of the Pretrial Order in the following respects:

The figure on Line 6 of $4,773.25 will be changed to $4,464.52.

The figure $954.65 on that same line will be changed to $892.90.

The figure on Line 8 of $145.87 will be changed to $133.39.

The figure on Line 10 of 58 will be changed to 52.

The figure on Line 12 of 580 will be changed to 520.

The figure on that same line, 975½ hours, will be changed to 877½ hours.

The figure on Line 13 of 1,423½ hours will be changed to 1,285½ hours.

And on page 4 of the pre-trial order, Relator's Contention No. 1 will be changed as follows: The figure $5,303.79 appearing on Lines 6 and 7 will be changed to $3,999.58.

The following exchange occurred between counsel:

Mr. Dunn: I have one more question to ask. Can we stipulate that if the Court finds the plaintiff is entitled to an attorney's fee what a reasonable attorney's fee would be?

Mr. Reinhardt: I certainly cannot stipulate to the amount you are asking for.

(Discussion off the record.)

Mr. Dunn: It is stipulated that if we recover the amount originally set forth in the pre-trial order $1,000 is a reasonable amount as attorney's fees.

Mr. Reinhardt: Yes.

[Endorsed]: Filed February 16, 1955.

No. 14,650

United States
COURT OF APPEALS
for the Ninth Circuit

GENERAL CASUALTY COMPANY OF AMERICA,
a corporation

Appellant

v.

SCHOOL DISTRICT #5, BAKER COUNTY,
STATE OF OREGON ex rel S. C. LYONS,

Appellee

BRIEF OF APPELLANT

JUSTIN N. REINHARDT,
909 Corbett Building,
Portland 4, Oregon,
Attorney for Appellant,

DUNN & JACKSON,
Baker, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4–55

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SCHOOL DISTRICT #5, BAKER COUNTY,
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Appellee

BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a final judgment (R. 15) entered after a trial without a jury by the United States District Court for the District of Oregon in favor of the Relator in the sum of $2,859.61, plus interest from July 10, 1952, $1,000.00 attorney fees and $178.00 costs, against Appellant as surety for James Lundgren dba Pacific Construction Company, a citizen and resident of the State of Washington, who was not served with process and did not appear.

The Pretrial Order shows that Appellant is a corporation of the State of Washington and is a citizen and resident of that State; Appellee is a citizen and resident of the State of Oregon; and the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs (R. 4).

The District Court had jurisdiction of the cause under the provisions of 28 U.S.C.A. Sec. 1332 (a) (1).

This Court has jurisdiction to review by appeal the judgment of the District Court under the provisions of 28 U.S.C.A. Sec. 1291. The case is not one in which a direct review may be had in the Supreme Court under 28 U.S.C.A. 1252 or 1253.

STATEMENT OF THE CASE

The action is for recovery of a balance claimed by Relator for sheet metal work performed between November 6, 1951, and July 3, 1952 (R. 7, 12) by Relator as a subcontractor (R. 6, 12) for Lundgren as general contractor on a high school and swimming pool at Baker, Oregon (R. 4, 11) for which Lundgren had previously paid Relator $10,780.60 (R. 5, 12).

The Pretrial Order set forth these issues of fact to be determined by the Court (R. 8):

1. Was there an agreement between the Parties? If so, what was it?
2. What labor and material did Relator furnish defendant Lundgren at his request?
3. What was their reasonable value?

4. Is Relator entitled to recover an attorney fee? If so, in what amount?

Relator testified that he was employed early in November, 1951, to build and install a smoke vent in a high school being constructed by Lundgren at Baker, Oregon (R. 22), and shortly thereafter to finish the rest of the sheet metal work on the school (R. 23). He purchased materials and performed labor during November and started billing Lundgren (R. 24).

His first bill (Ex. 14-A-1) was for a lump sum of $2,700 (R. 24) and the first payment he received was $800.00 on December 12, 1951 (R. 25, 26). There was correspondence (Exs. 14-A-1 and 2, 17, 18-A and B) and discussion between Relator and Lundgren in connection with this and subsequent billings regarding which (R. 24-27) Relator's testimony is confused and contradictory. Relator testified, however, that Exhibit 14-A-2 set out the terms under which he "had labored on the job and was continuing to labor" (R. 24). This was denied by Lundgren (R. 37-39) (Ex. 18-B).

There was no evidence regarding the labor and materials furnished by Relator except Relator's bills to Lundgren (Exs. 14-A, B and C), the time records kept by his employees (Ex. 15) and his bookkeeper (Ex. 19-A), social security tax returns (Ex. 16), State Industrial Accident returns (Ex. 1) and other internal records maintained by the Relator (Exs. 9A, A-1, B and C), his original summary of claim (Ex. 21) and his revised summary of claim (Ex. 25). These records are in complete contradiction each with the other (see schedules I and II).

Some of the discrepancies in Relator's records were brought out during his cross-examination. As a result Relator acknowledged that his claim of $5,303.79 was excessive and that his billings to Lundgren contained substantial overcharges which he had known about before going to trial (R. 29-30). Thereupon, the Court ordered the trial adjourned to give the Relator an opportunity to eliminate from his claim the items he knew to be unjustified (R. 30). The Pretrial Order was amended (R. 47-48, Ex. 25) to reduce Relator's claim to $3,999.58. The Court found even this amount excessive and allowed Relator only $2,859.61 (R. 14).

The contentions and findings regarding compensable time are shown in the following table:

	Employee's Time	*Relator's Time*	*Dollar Amount*
Original Pretrial Order (R. 47-48) (Ex. 21)	1423½ hours	975½ hours	$9727.87
Amended Pretrial Order (R. 7) (Ex. 25)	1285½ "	877½ "	8769.37
Trial Court's Finding (R. 13)	1169 "	774½ "	7869.00

During the recess at which the Pretrial Order was amended, the parties stipulated (R. 48) that if Relator should "recover the amount originally set forth in the Pretrial Order, $1,000.00 is a reasonable amount as attorney's fees." Relator recovered less than fifty-four per cent of "the amount originally set forth in the Pretrial Order." Nevertheless, the trial Court awarded Relator $1,000.00 attorney fees and $178.00 costs, or a total of $4,037.58, which is within one per cent of the $3,999.58 claimed by Relator in the amended Pretrial Order.

APPELLANT'S CONTENTIONS

1. There is no evidence to support the finding of the District Court as to the number of hours for which Relator is entitled to compensation.

No evidence of time spent was offered except the Relator's own records (Exs. 1, 9-A, A-1, B and C, 14-A, B and C, 15, 16, 19-A and 25). Hence, the credibility of witnesses is not involved.

The obvious mutual contradiction among Relator's records (schedules I and II) led to their complete rejection by the trial Court, which found a lower number of hours than appears in any of them. As a result, there is *no* evidence as to *any* amount of time on which the Court could have based this finding. But if there were a basis, it was not disclosed by the District Court as required by Rule 52 (a) F.R.C.P.

2. The District Court's award of $1,000.00 attorney fee is contrary to the stipulation (R. 48) that $1,000.00 would be a reasonable attorney fee if Relator should recover $5,303.79, the amount he originally claimed, not 54% thereof, which is what the Court allowed. The amount allowed is excessive, particularly in view of said stipulation.

3. The findings of the District Court as to attorney fees, the amount of time for which Relator is entitled to be compensated, and the rate of such compensation are not within the issues submitted, are not supported by, but are clearly contrary to, the evidence and do not support the judgment rendered.

4. The findings of the District Court are clearly erroneous and should be reversed.

ARGUMENT

POINT I

THE COURT ERRED IN FINDING RELATOR ENTITLED TO $7869.00 FOR LABOR

The Court found (R. 13) that Relator furnished materials to Lundgren at an agreed price of cost plus 20% with the exception of certain doors which were furnished at the rate of cost plus 10%. It made no finding of any agreement regarding compensation for labor, but found merely

> "that Relator furnished labor to defendant James Lundgren at the rate of 774½ of his own time at $4.50 an hour and 1169 hours of his employees' time at $3.75 an hour." (R. 13)

The Court's omission to make any finding as to an agreement regarding labor is striking because that is the only item in finding No. V (R. 13) as to which the Court failed to find an "agreement". Equally striking is the fact that the number of hours for which the Court found Relator entitled to compensation finds no support whatsoever in the record.

All the evidence of time spent was documentary. Relator identified the individual time record books in which each employee made his own entries (Ex. 15). He identified the sheet (Ex. 19-A) onto which these entries, chargeable to Lundgren, were taken off by Relator's

bookkeeper. The bills which Relator rendered to Lundgren (Exs. 14-A and C) he said were taken off this document (Ex. 19-A). Nowhere in any of them is there a figure or combination of figures which corresponds to the trial Court's findings.

Schedule I is a columnar comparison of the figures appearing in these documents. It reveals so many discrepancies between them that it would have been impossible for anybody to prepare any one of them on the basis of any of the others.

On cross-examination, Relator admitted his claim was excessive and that his bills contained overcharges (R. 29-30) which he had known about before going to trial. The Court ordered a recess to enable him to restate his claim (Ex. 25). The Pretrial Order was amended (R. 48) and the trial resumed on the basis of the revised Pretrial Order. This revision merely substituted one set of contradictory records for another, as an examination of the single item of smoke vent will clearly disclose (see Schedule II).

The amount of time actually charged to smoke vent on Relator's own internal records is 354½ hours of his own time and 566½ hours of his employees' time. Of this, 27 hours of his employees' time and 24 hours of his own time are accounted for on Exhibit 19-A during the period June 4 to July 3, 1952, for which no interim bill was submitted. But the bulk of the time was developed prior to June 4, 1952, and is reflected not only on Exhibit 19-A but also on the Relator's interim statement (Ex. 14-A). Thus, for the period November 6, 1951, to

April 25, 1952, Exhibit 19-A shows 512½ hours of employees' time and 306 hours of Relator's time, which corresponds quite closely to the number of hours charged to smoke vent on Relator's interim bills, namely: 508½ hours of employees' time and 341 hours of Relator's time.

In spite of the fact that Exhibit 19-A shows an additional 27 hours of employees' time and an additional 24 hours of Relator's time charged to smoke vent after the last interim bill period, Relator's final bill, Exhibit 14-C, of $3914.51 for smoke vent, charges not 539½ hours but 442 hours of employees' time and not 340 hours but 331½ hours of Relator's time. Thus, in his final bill he allocated to the smoke vent item 97½ hours less of employees' time and 8½ hours less of his own time than he should have by his own internal records.

But when he had the opportunity during the course of the trial (R. 29-31) to review his billings again, the result, as shown in Exhibit 25, is an understatement to the extent of 147 hours of employees' time and 30½ hours of his own time. There is only one possible explanation for this strange conduct and that is: Relator himself recognized that his time records so grossly overstated the amount of time attributable to the smoke vent that he felt obligated to reduce them; and by the same token his time records fell so far short of supporting his billings on other items that he felt free to attribute to them the 147 hours of employees' time and 30½ hours of his own time which had been entered on his records as having been spent on the smoke vent (see Schedule II).

SCHEDULE I

A Comperative Schedule of Exhibits 15, 19A, 14A, 9A, B, C,
for Hours of Employees

Period	Employee	Schedule I Page	1 Total Hours Paid by Relator Exhibit 9	2* Exhibit 15 Employees' Weekly Time Book: Hours Not Entered or Explained	3 Exhibit 15 Employees' Weekly Time Book: Total Entered	4 Exhibit 15 Employees' Weekly Time Book: "Worked for Others"	5 Exhibit 15 Employees' Weekly Time Book: "Baker"	6 Listed as Chargeable to Defendent on 19A	7 Charged to Defendent on 19A After Revision	8 Charged on Interim Billings 14A (2 - 7)
November, 1951	Gilkey	I - 1	66 1/2	↓ 6	60 1/2	5	55 1/2	57	47 1/2	
December, 1951	Gilkey	I - 3	19	- 9	28	2	26	25 1/2	24	
November, 1951	Griffith	I - 2	162 1/2	- 11 1/2	174	27	147	131	124 1/2	
To December 18, 1951	Griffith	I - 4	90	↓ 9	81	8	73	33	77	
Totals for billing of December 31, 1951			338	- 5 1/2	343 1/2	42	301 1/2	296 1/2	273	(2) 298
December 19 - 27	Griffith Alternate A	I - 4	55 1/2	- 1 1/2	57	5	52	56 1/2	52	
Januery , 1952	Griffith	I - 5	224 1/2	- 4	228 1/2	4	224 1/2	217	215 1/2	
Totals for billing of February 1, 1952			280	- 5 1/2	285 1/2	9	276 1/2	273 1/2	267 1/2	(3) 281 1/2
February, 1952	Griffith	I - 6	145	- 2	147	16	131	144	111	
February, 1952	Bumgardner	I - 7	116 1/2	↓ 82	34 1/2	-	34 1/2	91 1/2	91 1/2	
Totals for billing of February 29, 1952			261 1/2	↓ 80	181 1/2	16	165 1/2	235 1/2	202 1/2	(4) 203
March, 1952	Griffith	I - 8	159 1/2	↓ 4	155 1/2	10 1/2	145	145	139	
March, 1952	Bumgardner	I - 9	150	-	150	3 1/2	146 1/2	146 1/2	142 1/2	
Totals for billing of March 31, 1952			309 1/2	↓ 4	305 1/2	14	291 1/2	291 1/2	281 1/2	(5) 334 1/2
April, 1952	Griffith	I - 8	44	↓ 18 1/2	25 1/2	-	25 1/2	35	35	
April, 1952	Bumgardner	I - 10	175	-	175	31 1/2	143 1/2	141 1/2	108	
Totals for billing of May 1, 1952			219	↓ 18 1/2	200 1/2	31 1/2	169	176 1/2	143	(6) 210 1/2
May, 1952	Bumgardner	I - 11	197	-	197	44 1/2	152 1/2	130	53 1/2	
Totals for billing of June 6, 1952										(7) 93
Totals to June 6, 1952 billing			1,605	↓ 91 1/2	1,513 1/2	157	1,356 1/2	1,409 1/2	1,221	1,420 1/2
June, 1952	Bumgardner	I - 12	137 1/2	-	137 1/2	110 1/2	27	17 1/2	27	17 1/2**
July, 1952	Bumgardner	I - 13	45 1/2	-	45 1/2	13	32 1/2	32 1/2	32 1/2	32 1/2**
Grand totals			1,788	↓ 91 1/2	1,696 1/2	280 1/2	1,416	1,459 1/2	1,280 1/2	1,470 1/2

Hours claimed worked by employees on terminal billing of July 11, 1952, Exhibit 14C 1,407

Total variation of hours paid, Exhibit 9 and hours entered, Exhibit 15: 147 1/2

*Column 2 - paid less than entered on Exhibit 15
Column 2 ↓ paid more than entered on Exhibit 15

**Time between last interim bill June 6, 1952, Exhibit 14A - 7 and terminal bill July 11, 1952, Exhibit 14C, which is "meshed" in final bill.

Relator's juggling of time doesn't represent the correction of inadvertent errors. When he went to trial on the original Pretrial Order he knew his claim was excessive (R. 29-30), and the Court found it still excessive (R. 13) after Relator reduced it during the trial. This case is indistinguishable from *Tebbs v. Peterson* (Utah 1952), 247 P. (2d) 897, in which also

> "the plaintiff materially changed his testimony with respect to a material and observable fact * * *. The attempted reconciliation of the testimony * * * is palpably absurd * * *. The change of position clearly revealed an unblushing attempt to make a case."

Relator's misstatements cannot be justified, as his attorney attempted to do (R. 30), on the theory that

> "the overall charges in this matter actually total more than the amount we prayed for. We didn't adjust down to it, feeling that we would be bound by the amount that we prayed for $5303. Actually the total charges will come to more than that, when the whole thing is totalled."

Actually, Relator's total claim came to $3999.58, which is $1303.42 *less* than $5303.00 "when the whole thing is totalled."

Relator completely discredited both himself and his records by undertaking, as one Court has said:

> "to toy with the administration of the law and make a mockery of justice. The motive and purpose were clear. No possible explanation for this change of testimony appears, except that the exigencies of plaintiff's case demanded it." *Peterson v. Omaha State Ry. Co.,* 134 Neb. 322, 278 N.W. 561, 562.

Since Relator offered no testimony other than to identify the exhibits analyzed above and appellant of-

fered no evidence as to time because it was not in a position to do so, the trial Court had no logical alternatives but to accept or reject Relator's records *in toto*. It certainly was justified in rejecting them because they were mutually contradictory (see schedules I and II).

In *Magidson v. Driggan,* 212 Fed. (2d) 748, the Court said, at page 759:

> "The testimony of a witness who wilfully testifies falsely may be disregarded unless corroborated by credible evidence."

If the records of the Relator in this case are disregarded, there is no evidence whatever to support the findings and judgment.

The Court found that Relator furnished 1169 hours of his employees' time (R. 13), which is 247 hours less than the lowest figure shown on any of Relator's records, and 111½ hours less than the 1285½ hours Relator ultimately claimed (R. 48, 7). It also found (R. 13) that Relator furnished 774.5 of his own time, which is 103 hours less than the 877½ hours he ultimately claimed (R. 48, 7). This certainly does not represent an acceptance of Relator's evidence; and yet the trial Court had no basis for editing that evidence. It could not and did not, make a selection from among Relator's conflicting records because those records contain no figure or combination of figures which corresponds to the finding.

An indulgent attitude toward the type of evidence offered by the Relator is certainly not warranted. In *Gohlinghorst v. Russ,* 146 Neb. 470, 20 N.W. (2d) 381, the Court said:

> "the trial Court is not required to helplessly sit by and permit a litigant to play fast and loose with the processes of the Court by insisting at different dates under oath on the truth of each of two contradictory stories according to the exigencies of the particular occasion presenting itself. Courts must be vigilant in suppressing such schemes for the procurement of benefits by one to the detriment of another."

If Relator's records have any probative value whatever, it is only as an admission of the injustice of his claim. In *Andrews v. United States,* 157 Fed. (2d) 723, which was a prosecution for possession of forged tire certificates, knowing them to be forged, the Court quoted 20 Am. Jur. Evidence, Section 284, as follows:

> "An attempt to fabricate evidence is receivable as evidence of one's guilt of the main facts charged. Such fabrication is in the nature of an admission, for it will not be supposed that an innocent person would feel the necessity for fabricating evidence."

As a result, there is no foundation for any possible finding except that Relator failed altogether to prove the amount of time he and his employees furnished.

If the Court had any basis for finding that the Relator was entitled to compensation for any number of hours of his employees' time and his own time, it was necessary under Rule 52 (a) of the Federal Rules of Civil Procedure for the Court to make findings sufficiently explicit to give the reviewing Court a clear understanding of the basis of the trial Court's decision and to enable it to determine the ground upon which the trial Court reached the conclusion. *Maher v. Hendrickson,* 188 Fed. (2d) 700, 702; *McGavock v. Giolitto,* 201 Fed. (2d) 685.

In *Dearborn National Casualty Co. v. Consumers Petroleum Co.,* 164 Fed. (2d) 332, 333,

> "The Court made an ultimate finding of fact * * * but no subsidiary findings of fact were made to indicate upon what findings this conclusion of ultimate fact was based. There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the Court. Kelley v. Everglades Drainage District, 319 U.S. 415, 421-2, 63 Sup. Ct. 1141, 1145, 87 L. Ed. 1485."

The finding

> "that Relator furnished labor to defendant James Lundgren at the rate of 774.5 hours of his own time for $4.50 an hour and 1169 hours of his employees' time at $3.75 an hour" (R. 13)

manifestly does not conform to these requirements. See *Smith v. Dental Products Co.,* 168 Fed. (2d) 516, 518.

The rules applicable to this Court's review of the case at bar were enunciated in *Orvis v. Higgins,* 180 Fed. (2d) 537-9, quoted with approval in *Arnolt Corp. v. Stansen Corp.,* 189 Fed. (2d) 5, 10, as follows:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance."

Certainly, the Court's finding as to the number of hours finds no support in any oral testimony because on this subject there was none. The trial judge's finding must rest exclusively on the written evidence, viz: Relator's mutually contradictory records, which were rejected by the trial Court and which prove nothing but the lack of merit in Relator's claim. Under these circumstances, this Court has not only the authority but the duty to disregard the findings of the trial judge and reverse the judgment. *Waialua Agricultural Co. v. Maneja,* 216 Fed. (2d) 466, 474.

POINT II

THE COURT ERRED IN ALLOWING RELATOR $1,000 ATTORNEY FEES.

The statute under which this cause was instituted provides for the allowance of attorney fees to the prevailing party (ORS 279.516).*

It is well established that the amount of attorney fees should be based, among other things, upon the benefits derived, the amount involved, and the results accomplished. These are three of the eight factors enumerated by the Oregon Supreme Court in the case of *Schmalz v.*

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*ORS 279.516 — "In any action under ORS 279.512 * * * the prevailing party shall recover such attorney fees therein as the Court shall adjudge reasonable."

*ORS 279.512 — "any person who has supplied to any contractor labor or material for the prosecution of the work provided for in the contract referred to in ORS 279.510 (contract with a school district) * * * may institute an action* * * against the contractor and sureties on his own relation, but in the name of the * * * school district * * * concerned, and may prosecute the action to final judgment and execution, for his own use and benefit, as the fact may appear."

Arnwine, 118 Or. 300, 246 Pac. 718. These factors were disregarded by the District Court.

A. Based upon results accomplished, plaintiff was entitled to no more than $540.00 attorney fee.

The parties stipulated (R. 48) that if Relator should "recover the amount originally set forth in the Pretrial Order, $1,000 is a reasonable amount as attorney's fees." The "amount originally set forth in the Pretrial Order" was $5303.79, which was reduced by the Relator as a result of his cross-examination to $3999.58 and was further reduced by the Court in its findings and judgment to $2859.58. Hence instead of recovering "the amount originally set forth in the Pretrial Order" Relator recovered less than 54% thereof. Nevertheless, the Court found that $1,000 was a reasonable attorney fee and awarded that sum to the Relator. This was not only contrary to the stipulation; it would be excessive with or without such a stipulation.

B. Based on the amount involved, plaintiff was entitled to no more than $300.00 attorney fees.

The advisory schedule of minimum fees and charges adopted by the Oregon State Bar recommends a fee on the foreclosure of mechanics' liens of $150.00 where the amount involved is $1,500.00 and $395.00 where the amount involved is $5,000.00.

Cases of the general nature of the instant case in which the amount of attorney fees was passed upon are collected in 143 A.L.R. at pages 838-9. Mechanics' lien foreclosure cases dealing with attorney fees are collected in the same volume at pages 797-8. The amount al-

lowed in all but one of the cases cited in the annotation is far below $1,000.00, although the amount involved in almost all of them exceeds $3,000.00.

C. Every equitable consideration in this case militates against allowance of a fee as large as $1,000:

Attorney fees are allowed in these cases against the surety as exaction

> "for an unjust delay in payment after his liability is ascertained and the debt is actually due from him. Brainard v. Jones, 18 N.Y. 35, as quoted in 1 Brandt Suretyship Guaranty, above; Illinois Surety Co. vs. John Davis Co., 244 U.S. 376, 37 S. Ct. 614, 61 L. Ed. 1206; Dwyer v. U.S. (C.C.C.) 93 F. 616; Getchell & Martin Lumber Co. v. Peterson, 124 Iowa 599, 100 N.W. 550, 552; Holmes v. Standard Oil Co., 183 Ill. 70, 55 N.E. 647." *Goodsteed v. Duby,* 131 Or. 275, 283 P. 7.

The claim of $5,303.79 which Relator asserted (R. 48), was unjust, was known to him to be unjust when made (R. 29-30) and was found to be unjust by the trial Court (R. 16), even after it was reduced by Relator to $3,999.58 (R. 48).

This Court has said repeatedly that

> "the exercise of discretion * * * should be bottomed upon a finding of unfairness or bad faith in the conduct of the losing party or some other equitable consideration of similar force which makes it grossly unjust that the winner of the particular lawsuit be left to bear the burden of his own counsel fees which prevailing litigants normally bear." *Faulkner v. Gibbs,* 199 Fed. (2d) 635 at pages 641-2.

The trial Court's decision (R. 16) clearly establishes that the defendant's refusal to pay Relator's demand

was justified. Both Appellant's good faith and Relator's shabby conduct throughout this litigation clearly dictate the allowance of a minimum fee rather than a fee which can only be regarded as in the nature of a penalty assessed against the Appellant or a device to award Relator the amount of his claim* even though it was found to be excessive.

CONCLUSION

There is no evidence to support the finding of the District Court as to the number of hours for which Relator is entitled to compensation.

The basis, if any, of that finding was not disclosed by the District Court as required by Rule 52 (a) of the Federal Rules of Civil Procedure.

Since the only evidence on the subject is Relator's mutually contradictory records, the credibility of witnesses is not involved, and the findings of the District Court are not entitled to any weight beyond what is justified by the cold record. That record does not justify the findings and judgment.

The award of $1,000.00 attorney fees is excessive and contrary to the express stipulation of the parties.

The judgment appealed from should be reversed.

Respectfully submitted,

JUSTIN N. REINHARDT,
Attorney for Appellant, General
Casualty Company of America.

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*The judgment of $2,859.61 plus attorney fees of $1,000 is $140.00 less than the $3,999.58 Relator ultimately demanded, and if costs are included it is $38.00 more.

No. 14653

United States
Court of Appeals
for the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD,
Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—3-16-55

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NAMES AND ADDRESSES OF ATTORNEYS

MAURICE T. JOHNSON,
201 Lathrop Building,
Fairbanks, Alaska,
WILLIAM V. BOGGESS,
Room 213, Nerland Building,
545 Third Avenue,
Fairbanks, Alaska,

Attorneys for Plaintiff Corporation.

GEORGE B. McNABB, JR.,
Box 682, Fairbanks, Alaska,
JULIEN A. HURLEY,
Box 1043, Fairbanks, Alaska,
R. J. McNEALY,
Box 1912, Fairbanks, Alaska,
EVERETT W. HEPP,
Box 1022, Fairbanks, Alaska,

Attorneys for Defendants.

In the District Court for the District of Alaska,
Fourth Division

No. 7114

BANK OF FAIRBANKS, an Alaskan Banking Corporation, Plaintiff,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD, Defendants.

COMPLAINT

Now Comes the Plaintiff above-named and complains of the Defendants above-named and for a first cause of action alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was and is now a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 8th day of May, 1945, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

$10,000.00 "Mortgage Note

Fairbanks, Alaska, May 8, 1945. No. M-39

For value received, I promise to pay to the order of Bank of Fairbanks, at Fairbanks, Alaska, Ten thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable $300.00 per month on the 8th day of each month, beginning June 8, 1945, beginning ...., and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder and without demand become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, binds himself hereon as a principal, not as surety, and promises, if this note is not paid when due and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division, of Alaska.

/s/ A. L. Kaye

/s/ Jean Kaye

Security: Real Estate Mortgage"

III.

That the said Defendants A. L. Kaye and Jean Kaye, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of May 8th, 1945, and conditioned for the payment of the sum of $10,000.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitled it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 9th day of May, 1945, duly recorded in the Recorder's Office of Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 14 of Real Mortgages, as Instrument No. 97368, and was duly filed on the 9th day of May, 1945, in the Recorder's Office of said Fairbanks Recording Precinct, as a Chattel Mortgage, in Volume 5 of Chattel Mortgages, as Instrument No. 97369.

A copy of the said Real and Chattel Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "A" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of $9,100.00, leaving a balance due on principal in the sum of $900.00, and that the interest

has been paid to October 8th, 1951, and that therefore there is now a balance due of $900.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1951.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a second cause of action against the Defendants, above-named, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the

laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 22nd day of November, 1948, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her Attorney in Fact, made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

"Mortgage Note

$6,300.00

Fairbanks, Alaska. 22 Nov., 1948. No. M180

For value received, I promise to pay to order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Six Thousand Three Hundred and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable $500.00 per month on the 22nd day of each month, beginning 22 December, 1948, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value

received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

Security: Mortgage. Address: Box 550.

/s/ A. L. Kaye

/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact"

III.

That the said Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of November 22nd, 1948, and conditioned for the payment of the sum of $6,300.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit,

on the 8th day of December, 1948, duly recorded in the Office of the Recorder for Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 17 of Real Mortgages, as Instrument No. 110,949, and was duly filed on the 8th day of December, 1948, in the Recorder's Office of said Precinct, as a Chattel Mortgage, in Volume 5 of Chattel Mortgages, as Instrument No. 110,950. A copy of the said Real and Chattel Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "B" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of $2,200.00, leaving a balance of $4,100.00 due on principal, and that the interest has been paid to October 8th, 1951, and that therefore there is now a balance due of $4,100.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1952.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a third cause of action against the Defendants above-named, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 30th day of January, 1950, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

"Mortgage Note

$5,000.00

Fairbanks, Alaska, January 30, 1950. No. M-422

$1,000.00 on or before December 1, 1950
$4,000.00 on or before December 31, 1950, after date, for value received, I promise to pay to the order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum, payable quarterly and at maturity, until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including rea-

sonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

/s/ A. L. Kaye
/s/ Jean Kaye

Address: Box 555. Security: Real and Chattel on home."

III.

That the said Defendants A. L. Kaye and Jean Kaye, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of January 30th, 1950, and conditioned for the payment of the sum of $5,000.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 2nd day of February, 1950, duly recorded in the Recorder's Office of Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 21 of Real Mortgages, as Instrument No. 116,646, and was duly filed as a Chattel Mortgage on the 9th day of May, 1945, in the Recorder's Office for said Fairbanks Precinct, as Instrument No. 116,647, in Volume 6 of Chattel Mortgages. A copy of the said Real and Chattel

Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "C" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid, and that the interest has been paid to October 8th, 1951, and that therefore there is now a balance due and owing of $5,000.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1951.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a fourth cause of action against the Defendants, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 3rd day of February, 1951, at the City Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

"Mortgage Note

$5,000.00

Fairbanks, Alaska, February 3, 1951. No. M-483

On or before one year after date, for value received, I promise to pay to the order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum, payable quarterly and at maturity, until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith

become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

/s/ A. L. Kaye
/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact

Security: Real and Chattel Mortgage."

III.

That the said Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of February 3rd, 1951, and conditioned for the payment of the sum of $5,000.00 and interest

thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 5th day of February, 1951, duly recorded in the Office of the Recorder for Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 25 of Real Mortgages as Instrument No. 122,228, and was duly filed as a Chattel Mortgage in the Office of the Recorder for said Fairbanks Recording Precinct, on the 5th day of February, 1951, as Instrument No. 122,229 in Volume 7 of Chattel Mortgages, a copy of which mortgage is attached hereto and marked Exhibit "D" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of $2,011.91, leaving a balance of $2,988.09 due on principal, and that the interest has been paid to April 8th, 1952, and that therefore there is now a balance due of $2,988.09 in principal, together with interest at the rate of 8% per annum from April 8th, 1952.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and foreclose the said mortgage, and that the Plaintiff

hould be allowed a reasonable sum for attorney's ees herein.

VI.

That the Plaintiff is now the lawful owner and older of said promissory note and real and chattel nortgage.

VII.

That the Defendant, Josephine Boussard, has, or laims to have, some interest or claim upon said remises or some part thereof, as purchaser, mort-agee, judgment creditor, lien claimant, or other-vise, which interest or claim is subsequent to and ubject to the lien of the Plaintiff's mortgage herein.

Wherefore, the Plaintiff prays judgment against he said Defendants A. L. Kaye and Jean Kaye, nd each of them, as follows:

1. On its first cause of action, for the sum of 900.00, together with interest at 8% per annum rom the 8th day of October, 1951.

2. On its second cause of action, for the sum of 4,100.00, together with interest at 8% per annum rom the 8th day of October, 1951.

3. On its third cause of action, for the sum of 5,000.00, together with interest at 8% per annum rom the 8th day of October, 1951.

4. On its fourth cause of action, for the sum of $2,988.09, together with interest at 8% per annum rom the 8th day of April, 1952.

5. For the sum of $1,500.00 as and for Plain-iff's reasonable attorneys' fees herein, and for its osts and disbursements herein.

6. That it be adjudged and decreed that the Real and Chattel Mortgages hereinabove referred to be foreclosed and that the usual decree may be made for the sale of said premises by the United States Marshal of the Fourth Judicial Division, Territory of Alaska, or by any deputy Marshal thereof, according to law and the practice of this Court; that the proceeds of said sale may be applied in payment of the amounts due the Plaintiff hereunder, and that said Defendants A. L. Kaye and Jean Kaye, and all persons claiming under them subsequent to the execution of said real and chattel mortgages upon said property, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all rights, claim, or equity of redemption in said property, and every part thereof and that the said Plaintiff may have judgment, and execution against the said Defendants A. L. Kaye and Jean Kaye, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

7. That the Plaintiff, or any other party to the suit, may become a purchaser at such sale or sales; that the purchaser be let into possession of the property, and that the Plaintiff may have such other and further relief in the premises as to this court may seem meet and equitable.

BANK OF FAIRBANKS,

/s/ By R. C. BAILEY,
Vice President

MAURICE T. JOHNSON and
HUBERT A. GILBERT,
/s/ By MAURICE T. JOHNSON,
Attorneys for Plaintiff

Duly Verified.

EXHIBIT "A"

Mortgage—Real Chattel
(Copy)

This Agreement, Made this 8th day of May, 1945 by and between A. L. Kaye and Jean Kaye his wife parties of the first part, hereinafter called mortgagors and Bank of Fairbanks party of the second part, hereinafter called mortgagee;

Witnesseth:

That said parties of the first part, for and in consideration of the sum of Ten Thousand Dollars and no/100 ($10,000.00) Dollars, lawful money of the United States to us in hand paid, receipt whereof being hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell, and convey unto the party of the second part, the following described property, to-wit:

Real and personal property situate in the Townsite of Fairbanks, Fairbanks Precinct, Territory of Alaska, to-wit: Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96), according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the North end line of said Lot three on Seventh Avenue in the Town of Fairbanks, which said point is 55 feet from the North-

west corner of said Lot Three; thence East along the North end line of said Lot 65.1 feet to the Northeast corner thereof; thence continuing East along the North end line of said Lot Two 10 feet; thence South 79.25 feet along a line parallel to the West side line of said Lot 2; thence West along a line parallel to the North end line of said Lot Two 10 feet to the East side line of said Lot Three; thence South along said East side line of Lot Three 79.25 feet to the Southeast corner thereof on Eighth Avenue; thence West along the South end line of said Lot Three to a point which is 55 feet from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and the contents of said buildings, including all furniture, fixtures, carpets and utensils in the house on the above described property.

To have and to Hold said property, by way of mortgage, to secure the payment of Ten Thousand and no/100 ($10,000.00) Dollars, lawful money of the United States, and interest thereon, according to the terms of a certain promissory note of even date herewith, a full, true, and correct copy of said note, the original of which is now in the possession of mortgagee, being hereto attached and by this reference made a part of this agreement as if re-written herein.

If said note is well and truly paid, with interest thereon, according to all its terms and conditions this mortgage shall be void; if not so paid the

holder of said note may foreclose this mortgage according to law. Until some default on the part of the mortgagors, shall be entitled to the use and possession of mortgaged property and to the rents, issues, and profits thereof.

During the life of this agreement, Mortgagors shall keep mortgaged property insured against loss by fire in an equal amount to unpaid balance due for principal and interest on said note, having said policies of insurance made payable to mortgagor as its interest may appear, and depositing same with the mortgagee for safe keeping.

The Mortgagors shall pay all taxes levied against mortgaged property or other liens when due, but if they fail to do so, and the mortgagee is obliged to pay any such item, to protect the lien herein acquired, any such sum so paid by the mortgagee shall be added to the principal debt, and bear interest likewise, and be secured by this mortgage.

Time is of the essence of this agreement and binds the heirs, executors, administrators and assigns of the mortgagors.

In Witness Whereof, the mortgagors have hereunto set their hand and seal at Fairbanks, Alaska, this 8th day of May, 1945.

[Seal] /s/ A. L. Kaye
[Seal] /s/ Jean Kaye

Executed in the presence of:

/s/ Mildred Seeliger
/s/ Carol H. Pomeroy

United States of America,
Territory of Alaska—ss.

This is to certify that before me, this day, appeared A. L. Kaye and Jean Kaye his wife who are known to me to be the identical persons who subscribed their names to the within mortgage and each acknowledged before me that they executed said agreement freely and voluntarily.

In testimony whereof, I have hereunto set my hand and affixed my seal at Fairbanks, Alaska, this .....day of May A. D. 1945.

[Seal] /s/ Sylvia Lavery,
Notary Public in and for Alaska

(Chattel Affidavit)

United States of America,
Territory of Alaska—ss.

A. L. Kaye and Jean Kaye, husband and wife, being first severally, duly sworn, on oath, depose and say:

A. L. Kaye and Jean Kaye (says) I am the mortgagor (or one of them) named in the within mortgage.

P. A. Johnson (says) I am the Cashier of Bank of Fairbanks, Mortgagee.

Both say, that the foregoing chattel mortgage is made in good faith, to secure the payment of the sum of money therein named, which is a bona fide existing debt due the mortgagee from the mortgagors and that same is not intended to hinder,

delay, or defraud any creditor or creditors of the mortgagor.

/s/ A. L. Kaye
/s/ Jean Kaye
/s/ P. A. Johnson

Subscribed and sworn to before me this....day of May, 1945.

[Seal] /s/ Sylvia Lavery,
Notary Public in and for Alaska

Mortgage Note

$10,000.00

Fairbanks, Alaska, May 8, 1945. No. M-39

For value received, I promise to pay to the order of Bank of Fairbanks, at Fairbanks, Alaska, Ten thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable $300.00 per month on the 8th day of each month, beginning June 8, 1945, beginning ...., and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder and without demand become immediately due and payable. Principal and interest are payable only in Lgeal Currency of the United States of America. For value received each and every party

signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, binds himself hereon as a principal, not as surety and promises, if this note is not paid when due and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division, of Alaska.

/s/ A. L. Kaye
/s/ Jean Kaye

Security: Real Estate Mortgage. Address.....

EXHIBIT "B"

Mortgage

This Indenture, Made this 22nd day of November, 1948, by and between A. L. Kaye and Jean Kaye, his wife, of Fairbanks, Alaska, Mortgagors, and the Bank of Fairbanks, an Alaska Corporation, Mortgagee,

Witnesseth:

That said Mortgagors for and in consideration of the sum of six thousand three hundred and no/100ths ($6,300.00) dollars lawful money of the United States of America, to them in hand paid by Mortgagee, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell, convey, and confirm unto said Mortgagee, its successors and assigns, forever, the following de-

cribed real and personal property situate in Fair-
anks precinct, Alaska, to-wit:

Those certain portions of Lots Two (2) and Three
3) in Block Ninety-six (96) according to the of-
icial plat of said Townsite of Fairbanks, more par-
icularly described as follows: Commencing at a
oint on the North end line of said Lot Three on
Seventh Avenue in the Town of Fairbanks which
aid point is 55 ft. from the Northwest corner of
aid Lot three; thence east along the North end
ine of said Lot 65.1 ft. to the Northeast corner
hereof; thence continuing East along the North
nd line of said Lot Two 10 ft.; thence South 79.25
t. along a line parallel to the West side line of
aid Lot Two; thence West along a line parallel to
he North end line of said Lot Two 10 ft. to the
East side line of said Lot Three; thence South along
aid East side line of Lot Three 79.25 ft. to the
Southeast corner thereof on Eighth Ave.; thence
West along the South end line of said Lot Three to
a point which is 55 ft. from the Southwest corner
of said lot; thence North along a line parallel to
he West side line of said Lot Three to the point of
eginning; together with all buildings and improve-
ments situate thereon and contents of said buildings
ncluding all furniture, fixtures, carpets, appliances
and utensils in the house on the above-described
property. All of the above property is subject to a
mortgage dated May 8, 1945 to the above mortgagee
on which the unpaid balance this date is $3,400.00,
and a mortgage dated July 22, 1946 to the above

Mortgagee on which the unpaid balance this date is $300.00 both made by the above-mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Six thousand three hundred and no/100ths Dollars, together with interest thereon at the rate of eight per cent per annum from this date until paid, in lawful money of the United States of America, which said amount said Mortgagors hereby promise and agree to pay to said mortgagee according to the terms and conditions of one certain promissory note dated 22 November, 1948, in the amount of $6,300.00, bearing interest at the rate of eight per cent per annum of which the mortgagors are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are true and lawful owners of the real and personal property herein mortgaged and that the same is free and clear of all liens and encumbrances, and that they warrant and

vill forever defend the title thereto, subject, how-
ver, to the two mortgages described above.

Mortgagors further covenant and agree that, dur-
ng the life hereof, they will pay all taxes and
ssessments that are now or may hereafter be levied
gainst said real and personal property, and will
eep said mortgaged property free and clear of all
iens of laborers and materialmen, and will insure
aid building above described and the contents
hereof in a reliable insurance company against loss
y fire in a sum not less than the unpaid balance
f the principal amount of said promissory note,
nd will assign and deliver said policies to Mort-
agee so that the loss, if any, will be paid to Mort-
agee as its interest may appear, and in the event
f their failure to do so, Mortgagee may pay such
axes and assessments, and may pay and discharge
ny and all liens filed against said mortgaged prop-
rty, and may place such insurance and pay the
remiums thereon, and may make any other pay-
nent necessary to protect its mortgage security, and
Mortgagors shall, immediately upon demand of
Mortgagee, repay to Mortgagee the amount so ex-
ended by it, and Mortgagor's failure so to do may
e treated by Mortgagee as a violation of the terms
f this mortgage, and Mortgagee may declare the
ntire note and mortgage due and payable the same
s by expiration of time, and may proceed to fore-
lose this Mortgage as hereinafter provided; pro-
ided further, that if Mortgagee does not elect to
leclare this mortgage and said note due and pay-
ble, then all sums paid as taxes, assessments, for

discharging liens of laborers and materialmen, for fire insurance premiums, or for any other purpose necessary to protect its mortgage security, shall bear interest from the date of the payment thereof by Mortgagee at the rate of eight per cent per annum, shall be deemed secured by this mortgage, and shall be treated as a part of the principal for which this mortgage is given as security.

In the event of the failure of the Mortgagors to pay the principal due on said promissory note above-described and the interest thereon, or in the event of their failure to pay any installment of principal and interest as in said notes provided, or in the event of their failure to comply with any other provision of this mortgage, Mortgagee may declare this mortgage and the whole of the principal sum of said note and the interest thereon due and payable, and may immediately enter into possession of said mortgaged property, and the whole thereof, using all necessary force so to do, and may proceed to sell said mortgaged property as provided by law. And, to that end, Mortgagee is hereby authorized to delegate the power of seizure and sale of all of said personal property hereby mortgaged to the United States Marshal for the Fourth Judicial Division, Alaska, or to any of his deputies, and, in the event of the seizure of said property, he may proceed to sell said chattels at public auction in the manner provided by law for the sale of personal property under execution, and, from the proceeds thereof, shall pay, first, all expenses of seizure, keeping, and sale of said property, including a

reasonable fee for Mortgagee's attorney, and, second, shall apply the balance of the proceeds in reduction of said mortgage indebtedness, rendering the overplus, if any there be, to the Mortgagors herein.

And if said personal property does not sell for sufficient amount to pay all sums due under this mortgage and to pay the expenses of seizure, keeping, and sale of said personal property, including a reasonable fee for Mortgagee's attorney, Mortgagee may, at its option, proceed to foreclose this mortgage as to the real estate herein mortgaged; provided, however, the Mortgagee may, if it so elects, at any time after default as herein provided for, foreclose this mortgage as a whole, both as to said personal property and said real property and may sell the same as a whole, and any and all expenses, charges, and fees connected with such litigation, including the costs of enforcing any judgment and decree obtained herein and a reasonable fee for Mortgagee's attorney, shall be deemed to be secured hereby, and such judgment shall bear interest at the rate of eight per cent per annum from the date thereof until paid.

Until default on the part of the Mortgagors and a demand for possession by Mortgagee, Mortgagors may remain in the quiet, peaceable, and undisturbed possession of said mortgaged personal property, and the whole thereof, but said personal property shall not be removed, during the life hereof, from the Fairbanks Precinct, Alaska.

The terms and conditions hereof shall inure to

and bind each of the parties hereto and the successors and assigns of said Mortgagee and the heirs and assigns of said Mortgagors.

Time is of the essence hereof.

In Witness Whereof, said Mortgagors have hereunto set their hands and seals at Fairbanks, Alaska, on the day and year first above-written.

[Seal] /s/ A. L. Kaye
[Seal] /s/ Jean Kaye by A. L. Kaye,
Attorney in Fact

Signed, sealed and delivered in the presence of:
/s/ Mildred Seeliger
/s/ Olga M. Holecek

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

This Is To Certify That on this 3rd day of December, 1948, before me, the undersigned, a Notary Public in and for the Territory of Alaska, personally came A. L. Kaye and Jean Kaye by her attorney, to me known to be the persons described in and who executed the within and foregoing real and chattel mortgage, and acknowledged to me that they signed and sealed said instrument as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal on the day and year in this certificate first above written.

[Seal] /s/ Phillip A. Johnson,
Notary Public for Alaska

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

A. L. Kaye and Jean Kaye by her attorney, and P. A. Johnson, being first duly sworn, each for himself and not one for the other, on oath deposes and says:

We are the Mortgagors named in the foregoing Real and Chattel Mortgage;

I am the Vice President of the Bank of Fairbanks, an Alaska corporation, the Mortgagee named in said mortgage;

Each Affiant: That said Mortgage is made in good faith to secure the amount named therein, which is a bona fide existing debt owing from Mortgagor to Mortgagee and due as and when in said Mortgage and note hereinabove described, and this mortgage is not given or made with any purpose, intention, or design of hindering, delaying, or defrauding any creditor or creditors of Mortgagors.

/s/ A. L. Kaye
/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact

/s/ P. A. Johnson

Subscribed and sworn to before me on this 3rd day of December, 1948.

[Seal] /s/ Phillip A. Johnson,
A Notary Public for Alaska

Recorded as a Real Mortgage on December 8th, 1948, in Volume .. of Real Mortgages as instrument No. 110,949.

Filed as a Chattel Mortgage on December 8th, 1948, in Volume 6 of Chattel Mortgages as instrument No. 110,950.

EXHIBIT "C"

Mortgage

This Indenture, made this 30th day of Jan., 1950, by and between A. L. Kaye and Jean Kaye, his wife, of Fairbanks, Alaska, Mortgagors, and the Bank of Fairbanks, an Alaska Corporation, Mortgagee,

Witnesseth:

That said Mortgagors, for and in consideration of the sum of Five Thousand and No/100ths ($5,000.00) dollars lawful money of the United States of America, to them in hand paid by Mortgagee, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell, convey, and confirm unto said Mortgagee, its successors and assigns, forever, the following described real and personal property situated in Fairbanks precinct, Alaska, to-wit:

Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the north end line of said Lot Three on

Seventh Avenue in the Town of Fairbanks which said point is 55 ft. from the Northwest corner of said Lot Three; thence East along the North end line of said lot 65.1 ft. to the Northeast corner thereof; thence continuing East along the North end line of said Lot Two 10 ft.; thence South 79.25 ft. along a line parallel to the West side line of said Lot Two; thence West along a line parallel to the North end line of said Lot Two 10 ft. to the East side line of said Lot Three; thence South along said East line of Lot Three 79.25 ft. to the Southeast corner thereof on Eighth Ave.; thence West along the South end line of said Lot Three to a point which is 55 ft. from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning: together with all buildings and improvements situate thereon and the contents of said buildings including all furniture, fixtures, carpets, appliances and utensils in the house on the above described property. All of the above property is subject to a mortgage dated May 8, 1945 to the above mortgagee on which the unpaid balance this date is $900.00, and a mortgage dated 22 November 1948 to the above mortgagee on which the unpaid balance this date is $6,300.00, and a mortgage dated 24 June 1949 to the above mortgagee on which the unpaid balance this date is $700.00, all three made by the above mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said

real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Five Thousand and no/100ths dollars, together with interest thereon at the rate of eight (8) per cent per annum from this date until paid, in lawful money of the United States of America, which said amount said Mortgagor hereby promise and agree to pay to said Mortgagee according to the terms and conditions of one certain promissory note dated 30 January, 1950, in the amount of $5,000.00, bearing interest at the rate of eight per cent per annum of which the mortgagors are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force, and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are the true and lawful owners of the real and personal property herein mortgaged, and that the same is free and clear of all liens and encumbrances, and that they will warrant and will forever defend the title thereto, subject, however, to the three mortgages described above.

[Printer's Note: The balance of Exhibit "C" is the same as Exhibit "B" set out at pages 27-30.]

EXHIBIT "D"

Mortgage

This Indenture, made this 3rd day of Feb. 1951, y and between A. L. Kaye and Jean Kaye, his vife, of Fairbanks, Alaska, Mortgagor, and the Bank of Fairbanks, an Alaska Corporation, Mortagee,

Witnesseth:

That said Mortgagor, for and in consideration of he sum of Five Thousand and no/100ths ($5,-00.00) dollars lawful money of the United States f America, to them in hand paid by Mortgagee, he receipt whereof is hereby acknowledged do by hese presents grant, bargain, sell, convey, and con-rm unto said Mortgagee, its successors and assigns, orever, the following described real and personal roperty situated in Fairbanks precinct, Alaska, o wit:

Those certain portions of Lots Two (2) and Three (3) in Block ninety-six (96) according to the fficial plat of said Townsite of Fairbanks, more articularly described as follows: Commencing at point on the North end line of said Lot Three on Seventh Avenue in the Town of Fairbanks which aid point is 55 ft. from the Northwest corner of aid Lot Three; thence East along the North end ine of said lot 65.1 ft. to the Northeast corner hereof; thence continuing East along the North end ine of said Lot Two 10 ft.; thence South 79.25 ft. long a line parallel to the West side line of said Lot Two; thence West along a line parallel to the

North end line of said Lot Two 10 ft. to the East side line of said Lot Three; thence South along said East line of Lot Three 79.25 ft. to the Southeast corner thereof on Eighth Ave.; thence West along the South end line of said Lot Three to a point which is 55 ft. from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and the contents of said buildings including all furniture, fixtures, carpets, appliances and utensils in the house on the above described property. All of the above property is subject to a mortgage dated May 8, 1945 to the above mortgagee on which the unpaid balance this date is $900.00, and mortgage dated 22 November 1948 to the above mortgagee on which the unpaid balance this date is $4100.00, and a mortgage dated 30 January 1950 to the above mortgagee on which the unpaid balance is $5000.00, all three made by the above mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Five Thousand and no/100ths dollars, together with interest thereon at the rate of eight (8) per cent per annum from this date until paid, in lawful money of the United

States of America, which said amount said Mortgagor hereby promise and agree to pay to said Mortgagee according to the terms and conditions of one certain promissory note dated February 3, 1951, in the amount of $5,000.00, bearing interest at the rate of eight per cent per annum of which the mortgagor are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force, virtue, and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are the true and lawful owners of the real and personal property herein mortgaged, and that the same is free and clear of all liens and encumbrances, and that they will warrant and will forever defend the title thereto.

[Printer's Note: The balance of Exhibit "D" is the same as Exhibit "B" set out at pages 27-30.]

[Endorsed]: Filed April 23, 1952.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes Now the defendant, Josephine Boussard, and for answer to plaintiff's Complaint admits, denies, and avers, as follows:

I.

Admits paragraphs I, II, and III of plaintiff's Four Causes of Action as set out in its Complaint.

II.

For lack of knowledge and information denies paragraph IV of plaintiff's Four Causes of Action as set out in its Complaint.

III.

Denies paragraph V of plaintiff's Four Causes of Action as set out in its Complaint.

IV.

Admits paragraph VI and paragraph VII in plaintiff's Four Causes of Action as set out in its Complaint.

First Affirmative Defense

For her Affirmative Defense against the plaintiff, the defendant, Josephine Boussard, alleges and says:

I.

That on the 9th day of October, 1951, a Contract of Purchase and Sale was entered into between the defendants', A. L. Kaye and Jean Kaye, and the de-

fendant, Josephine Boussard, concerning the real property which is the subject of this action, a true copy of said contract being attached hereto, made a part hereof by reference as though set out in full and marked Exhibit "1".

II.

That defendant, Josephine Boussard, purchased property described in Exhibit "1" from A. L. Kaye and Jean Kaye, subject to mortgages set out in plaintiff's Complaint, for the sum of $31,500.00, of which sum $4,000.00 is not set out in said Exhibit "1", and that the said sale was consummated with complete knowledge and consent of plaintiff's officers.

III.

That on the 9th day of October, 1951, the original of this defendant's Exhibit "1", together with the original of escrow instructions annexed to Exhibit "1", together with a Warranty Deed conveying the property described in said contract was given to the plaintiff and placed in escrow by said plaintiff with full and complete knowledge of the actions and agreements made between the parties to said transaction.

IV.

That pursuant to the terms of said contract, the defendant, Josephine Boussard, on the 10th day of November, 1951, paid to plaintiff the sum of $200.00 plus interest at the rate of 8% per annum on the $15,000.00 and this defendant has continued to make said payments on principal balance and interest,

on or before the 10th day of each and every month thereafter and is not in default and said plaintiff accepted such payments of principal and interest and applied the same upon the indebtedness mentioned in plaintiff's Complaint, and this defendant is ready, willing and able to complete her said contract according to the terms thereof.

V.

That this defendant fully relying upon the promises and representations made to her and to her agent, by plaintiff's officers, that plaintiff would accept payments to discharge the mortgages set out in plaintiff's Complaint, according to the terms and in the manner as set out in Exhibit "1", she proceeded in good faith to sign said contract and thereafter made payments to plaintiff as aforementioned. That by reason of plaintiff's promises, representations and receipt of payments and interest under said contract, and applying such payments to the said mortgage indebtedness, and in consideration of the mutual agreements, express and implied, of this defendant assuming, taking over and paying off the defendants Kaye's said mortgages, plaintiff has waived its right of foreclosure on said mortgages and has extended the time for payment thereof and is estopped, being lawfully bound to accept payment of said mortgage indebtedness according to the terms of said Exhibit "1", and this defendant will be subject to irreparable damage if the prayer to plaintiff's Complaint be granted.

VI.

That it has become necessary for the defendant, Josephine Boussard, to employ an attorney to defend her interests and she should recover a reasonable fee for her said attorney.

Second and Alternative Affirmative Defense

I.

Repleads paragraphs I, II, III, IV of this defendant's First Affirmative Defense, as though set out in full again.

II.

That at all times herein mentioned, this defendant has fulfilled all of the terms, covenants and conditions set forth in the contract Exhibit "1", and at all times mentioned has acted in good faith.

III.

That in the event this defendant is denied relief on her First Affirmative Defense, then her contract, Exhibit "1", and escrow agreement with the defendants' Kaye, should be adjudged a lien upon the real and personal property described in plaintiff's Complaint, and this defendant should have judgment against the other defendants and be subrogated to all of their rights and title in and to said property, including the right of redemption.

IV.

That it has become necessary for the defendant, Josephine Boussard, to employ an attorney to defend her interests and she should recover a reasonable fee for her said attorney.

Wherefore, the defendant, Josephine Boussard, having fully answered plaintiff's Complaint and set forth her Affirmative Defenses, prays the Court as follows:

1. That plaintiff take nothing by its action;

2. That in the alternative, her contract, Exhibit "1", be adjudged a lien upon the real and personal property described in plaintiff's Complaint, and that she recover judgment against defendants', A. L. Kaye and Jean Kaye, for all money expended on account of said contract, and that she be subrogated to all of the right, title and interest of the other said defendants, in and to said property, including the right of redemption.

3. For a reasonable fee for her attorney.

4. For such other and further relief as may be just and equitable in the premises.

/s/ R. J. McNEALY,
Attorney for defendant, Josephine Boussard

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "1"

Contract of Purchase and Sale

This Agreement, made and entered into in triplicate on this 9 day of October, 1951, by and between A. L. Kaye and Jean Kaye, husband and wife, hereinafter called "Sellers", and Josephine Baussard, hereinafter called "Buyer",

Witnesseth:

Whereas, Sellers own the real property hereinfter described and Buyer has agreed to purchase ame on the terms and conditions hereinafter set orth, notwithstanding the fact that said property s subject to mortgages in favor of the Bank of 'airbanks securing four promissory notes, payable o said bank for an aggregate sum of Fifteen Thouand Dollars ($15,000.00), with interest from Ocober 1, 1951, at Eight Percent (8%) per annum, t being understood and agreed that payments made nder this contract will be applied to the satisfacion of said notes and mortgages prior to delivery f deed hereunder.

Now, Therefore, for and in consideration of the um of One Thousand Dollars ($1,000.00), lawful ioney of the United States, in hand this day paid o Sellers by said Buyer, receipt whereof is hereby cknowledged as down payment on the purchase rice hereinafter mentioned, and in reduction theref, said Sellers hereby agree to grant, bargain, sell, nd convey to said Buyer, and said Buyer hereby grees to purchase the following described parcel f land in the Fairbanks Recording District, Fourth Division, Territory of Alaska, to-wit:

> Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the North End line of Lot Three (3) on Seventh Avenue in the Townsite of Fairbanks, Alaska, which said

point is 55 feet from the Northwest Corner of said Lot Three (3); thence East along the North end line of said lot 65.1 feet to the Northeast corner thereof; thence continuing East along the North end line of Lot Two (2) 10 feet; thence South 79.25 feet more or less along the West line of the property conveyed to Lillian M. Webb by deed recorded in Book 36 Deeds, Page 632 to the North line of the property conveyed by Carroll H. Van Scoy et ux to Martin Gray et ux by deed recorded in Book 43 Deeds, Page 29; thence West and along the said North line to the East line of Lot 3, thence S. along E. line of Lot Three (3) 79.25 feet more or less to the Southeast corner thereof on Eighth Avenue; thence West along the South line of Lot Three (3) to a point 69 feet from the Southwest corner of Lot Three (3); thence North 39° 31′ East 77.36 feet; thence West and along a continuation of the line dividing the property of Berry and Krize 13 feet; thence North 39° 30′ East 76.94 feet to the point of commencement, together with dwelling thereon,

for the full purchase price of $27,500.00, lawful money of the United States, with interest on the deferred balance of $26,500.00 as follows, to-wit: interest upon $15,000.00 to be paid by the application of the first installments hereunder to the aforesaid notes and mortgages at the rate of 8% per annum, the remainder of money due from Buyer to Sellers under this contract to carry interest at the rate of

6% per annum from date hereof, deferred payments and interest to be paid as follows:

The sum of Two Hundred Dollars ($200.00) on or before the 10th day of November, 1951, plus interest on the $15,000.00 due the bank, as aforesaid, and $200.00 on or before the 10th day of each and every month thereafter, plus interest on the reduced principal pertaining to said notes and mortgages at the rate of 8% per annum, until said $15,000.00, with interest, applicable to said notes and mortgages is fully liquidated, after which monthly payments of $200.00 per month, applicable on the remainder of purchase price, as above specified, shall be paid, plus interest at the rate of 6% per annum, all of which payments are to be made for the account of Sellers at the Bank of Fairbanks, Fairbanks, Alaska, each of which payments on principal shall in reduction of principal, upon which reduced balance interest is to be computed for the following month.

Said Buyer reserves the right to pay larger amounts than above specified at any time, up to balance in full.

It is hereby mutually agreed between the parties hereto that, in the event of the failure of Buyer to pay each of said deferred installments of purchase price and interest, as and when the same become due, as hereinabove specified, or in the event of her failure to comply with each and all of the provisions of this agreement, said Sellers shall be released from all obligation, in law or equity, to convey said property to Buyer, and all Buyer's rights

under this agreement to the above described real and personal property shall, at the option of Sellers, be forfeited, and said Sellers may resume possession thereof and may retain as rental for the use of said property and as liquidated damages all sums of money theretofore paid by Buyer as part of the purchase price and interest above mentioned, provided that, in the event Buyer defaults hereunder, Sellers may make a payment, or payments, required upon said notes and mortgages to prevent default with respect thereto.

Said Buyer hereby covenants and agrees with said Sellers that she will assume and pay, before the same become delinquent, all taxes and assessments which may be hereafter levied by any lawful authority on the above described property.

Said Buyer agrees to keep said building insured against loss by fire at her own expense in a reliable insurance company in a sum not less than the amount due Sellers hereunder, said insurance to be made payable to the parties hereunder as their respective interests appear, the policies to be deposited with the escrow holder hereinafter mentioned.

Said Sellers agree that Buyer shall have exclusive possession of said property from date hereof, unless and until default occurs.

Said Buyer agrees to keep and maintain said property in good condition and repair at her own expense, and to keep said premises free and clear of all liens and encumbrances of every kind whatso-

ver until said purchase price and interest are fully aid. (Excepting aforesaid mortgages).

It is further agreed that, in order to carry out he terms of this agreement, Sellers shall make, execute, and place in escrow at the Bank of Fairanks, Fairbanks, Alaska, a good and sufficient Warranty Deed to said above described property, onveying the same to Buyer, her heirs, and assigns, pon the fulfillment by her of all the terms, covnants, and agreements herein contained, but not therwise.

Time is of the essence of this agreement, but vaiver of any default shall not be deemed to be a vaiver of any subsequent default.

In Witness Whereof, the parties hereto have ereunto set their hands and seals on the day and ear in this instrument first above written.

Seal] A. L. Kaye
Seal] Jean Kaye

/s/ By A. L. Kaye,
Her Attorney in Fact,
Sellers

Seal] /s/ Josephine Baussard,
Buyer

n the Presence of:

/s/ Lazar Dworkin
/s/ John P. Cain

United States of America,
Territory of Alaska—ss.

This Is To Certify that on this 9 day of October, 1951, before me, the undersigned, a Notary Public for Alaska, personally came A. L. Kaye, for himself and in his capacity as attorney in fact for Jean Kaye, to me known to be the person described in and who executed the within and foregoing contract, and he acknowledged to me that he signed and sealed same as the free and voluntary act of himself and his said principal for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal on the day and year in this certificate first above written.

[Seal] /s/ Lazar Dworkin,
Notary Public for Alaska

Escrow

To: The Bank of Fairbanks October 9, 1951
Fairbanks, Alaska

The following is handed you herewith:

An executed copy of Contract of Purchase and Sale this day entered into between A. L. Kaye and Jean Kaye, as Sellers, and Josephine Baussard, as Buyer, pertaining to portions of Lots 2 and 3, Block 96, Fairbanks Townsite, for the total purchase price of $27,500.00, the down payment being $1,000.00, and balance to be paid in installments of $200.00, plus interest, per month.

One Warranty Deed from the aforesaid Sellers o the aforesaid Buyer covering said property.

You are instructed as follows: retain said Warranty Deed, together with this escrow and said Contract, until such time as the installments provided or in said Contract have been paid in full, or said Contract has been otherwise terminated. If, as, and when said Buyer has paid the entire balance due, nd presented proof of same, you should deliver aid Warranty Deed to her. The installment payments will be made to Sellers at your bank.

You are instructed further that from the outset, ayments of $200.00, plus interest accrued at the ate of 8% per annum, as indicated by notes and nortgages held by the bank, are to be applied by the ank toward the payment of said notes and mortages, after which such installment payments, plus nterest on the remaining balance under this conract at the rate of 6% per annum, are to be deposited to the account of Sellers at your bank.

You are further instructed that if, in the event aid Buyer has defaulted, and due proof is preented to you of same, and that Sellers have elected o forfeit and determine said installment Contract, nd have so terminated same, you are to return said Warranty Deed to them upon their request.

At the time of delivery of said Deed to Buyer, ou are authorized and instructed to attach to said Deed the required documentary stamps, the costs hereof to be charged to Sellers. Sellers will also

pay your escrow charges and charges for receiving said installment payments.

/s/ A. L. Kaye
Jean Kaye
/s/ By A. L. Kaye, Her Attorney in Fact
Sellers
/s/ Josephine Baussard
Buyer

[Endorsed]: Filed June 12, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, A. L. KAYE AND JEAN KAYE

Come Now, the defendants, A. L. Kaye and Jean Kaye, and for answer to plaintiff's Complaint, admit, deny and allege as follows:

I.

Admit the Allegations contained in Paragraphs I, II, III, IV and VI in each of plaintiff's four Causes of Action.

II.

Deny the allegations contained in Paragraph V of each of said causes of action.

III.

Answering the allegations contained in Paragraph VII of each of said causes of action, deny

that the claim and interest of Josephine Boussard is subsequent to and subject to the lien of plaintiff's mortgages referred to in said causes of action.

For a further, separate and affirmative answer and defense to each of plaintiff's four causes of action, defendants allege.

I.

That on the 9th day of October, 1951, a contract of purchase and sale was entered into by and between A. L. Kaye and Jean Kaye, referred to as sellers, and Josephine Boussard, referred to as buyer, a copy of which is attached to and made a part by reference of the answer filed herein by the defendant, Josephine Boussard, and is hereby referred to and made a part of this answer, which said contract, together with the Escrow instructions were marked as Exhibit "I".

II.

That said contract of sale and said escrow instructions were entered into with the full knowledge and consent of plaintiff and the plaintiff agreed to act as escrow holder of the contract of sale, the deed transferring the property from these defendants to the defendant, Josephine Boussard, and it was also agreed by and between the plaintiff and defendants that the said notes and mortgages referred to in the four causes of action contained in plaintiff's Complaint would be extended and that

the said plaintiff would accept the monthly payments of $200.00 per month, together with the interest due thereon, as payments upon said mortgages and that no further payments would be required to be made by the said defendant or any of them. That it was with this understanding and agreement between the plaintiff and the defendants that the defendants, A. L. Kaye and Jean Kaye, agreed to sell said property to the defendant, Josephine Boussard. That plaintiff accepted said payments and the said defendant, Josephine Boussard, has continued to make said payments each month to the said bank to apply upon said mortgages as agreed upon by all of the said parties to this action and the said bank has accepted the same and applied them upon said notes and mortgages in part payment thereof.

III.

That the said defendants, A. L. Kaye and Jean Kaye, relying upon the promises of the said plaintiff to extend said notes and mortgages and to accept said payments as in said contract provided agreed to sell said property to the said Josephine Boussard and the said plaintiff has waived its right of foreclosure of said mortgages and should be estopped from claiming that it has a right to foreclose said mortgages and sell said property as prayed for in said Complaint on file herein.

Wherefore, said defendants pray that said Complaint of plaintiff be dismissed and that said defendants recover their costs and disbursements

herein and a reasonable attorney's fee to be allowed by the Court.

/s/ JULIEN A. HURLEY,
Attorney for Defendants,
A. L. Kaye and Jean Kaye.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed June 25, 1952.

[Title of District Court and Cause.]

REPLY TO THE ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT, JOSEPHINE BOUSSARD

Now Comes the Plaintiff above-named, and for reply to the Answer and Affirmative Defenses of the Defendant, Josephine Boussard, admits, denies and alleges as follows:

I.

This Plaintiff admits the allegations contained in Paragraph I of the First Affirmative Defense contained in the answer of Defendant, Josephine Boussard.

II.

With reference to the allegations contained in Paragraph II of the Defendant Boussard's First Affirmative Defense, the Plaintiff does not have sufficient knowledge thereof upon which to base a belief and therefore denies the same.

III.

With reference to the allegations contained in Paragraph III of the Defendant Boussard's First Affirmative Defense, the Plaintiff admits that the contract was placed in escrow with the Plaintiff, but denies the remaining allegations of said Paragraph III.

IV.

The Plaintiff denies the allegations contained in Paragraphs IV, V, and VI of the First Affirmative Defense of the Defendant Boussard.

V.

With reference to the Second and Alternative Affirmative Defense contained in the answer of the Defendant Boussard, the Plaintiff does not have sufficient knowledge thereof regarding Paragraphs I, II, III and IV of the Second and Alternative Affirmative Defense upon which to base a belief and, therefore, denies the same.

Wherefore, the Plaintiff prays as by its Complaint filed herein.

BANK OF FAIRBANKS,
/s/ By R. C. BAILEY,
Vice-President.
/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed October 13, 1953.

[Title of District Court and Cause.]

REPLY TO ANSWER OF THE DEFENDANTS, A. L. KAYE AND JEAN KAYE

Now Comes the Plaintiff, above-named, and for reply to the answer of the Defendants, A. L. Kaye and Jean Kaye, admits, denies and alleges as follows:

I.

With reference to the allegations contained in Paragraph I of the separate and affirmative defense, the Plaintiff does not have sufficient knowledge thereof upon which to base a belief and, therefore, denies the same, for the reason that no copy of the alleged contract was attached to the copy of the answer served upon this Plaintiff.

II.

With reference to the allegations contained in Paragraph II of the affirmative defense, the Plaintiff admits that the contract of sale was placed in escrow with the Plaintiff together with the deed transferring the property from the Defendants, A. L. Kaye and Jean Kaye, to the Defendant, Josephine Boussard, but this Plaintiff denies each and all of the remaining allegations contained in said Paragraph II.

III.

The Plaintiff denies the allegations contained in Paragraph III of the affirmative defense.

Wherefore, the Plaintiff prays as by its Complaint herein.

BANK OF FAIRBANKS
/s/ By R. C. BAILEY,
Vice-President, Plaintiff.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed October 13, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for hearing on the 16th day of August, 1954, before the Honorable Harry E. Pratt, District Judge; and the Plaintiff having appeared by and through its attorney Maurice T. Johnson; and the Defendants A. L. Kaye and Josephine Boussard having appeared personally and by and through their attorney George B. McNabb, Jr.; and the Plaintiff and the Defendants having introduced oral and written testimony and evidence in behalf of each of them; and the Court having heard the same and being duly apprised in the premises does hereby make and enter the following its,

Findings of Fact

I.

That the Plaintiff is an Alaskan Banking Corporation duly authorized and existing under and by virtue of the laws of the Territory of Alaska.

II.

That the Plaintiff has filed its annual report last due and has paid its corporate tax last past due to the Territory of Alaska.

III.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a promissory note dated May 8, 1945, in the principal sum of Ten Thousand ($10,000.00) Dollars, a copy of which note was introduced into evidence as the Plaintiff's Exhibit C, upon which said note there was a principal balance due as of the 8th day of November, 1951, in the sum of Nine Hundred ($900.00) Dollars.

IV.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were further indebted to the Plaintiff on a certain promissory note dated November 22, 1948, said note being in the principal sum of Six Thousand Three Hundred ($6,300.00) Dollars, a copy of which said note was introduced into evidence as the Plaintiff's Exhibit E, and upon said 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were

indebted to the Plaintiff on said note in the principal sum of Four Thousand One Hundred ($4,100.00) Dollars.

V.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a certain promissory note dated January 30, 1950, said note being in the principal sum of Five Thousand ($5,000.00) Dollars, a copy of which said note was introduced into evidence as Plaintiff's Exhibit G; and on said 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on said note in the principal sum of Five Thousand ($5,000.00) Dollars.

VI.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a certain promissory note dated February 3, 1951, said note being in the principal sum of Five Thousand ($5,000.00) Dollars, a copy of which said note was introduced into evidence as Plaintiff's Exhibit I. On said 8th day of November, 1951, the Defendants were indebted on said note in the principal sum of Five Thousand ($5,000.00) Dollars.

VII.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on the four (4) promissory notes hereinabove mentioned in the principal sum of Fifteen Thousand ($15,000.00) Dollars, together

with accrued interest thereon. Said interest computed or to be computed at the rate of eight (8%) per cent per annum.

VIII.

Each, every and all of the hereinabove mentioned promissory notes was secured by a real and chattel mortgage duly executed by the Defendants A. L. Kaye and Jean Kaye, which said mortgage constituted a lien and encumbrance against the following described real property situate in the City of Fairbanks, Fairbanks Precinct, Territory of Alaska more particularly described as follows, to-wit:

Those certain portions of Lot Two (2) and Three (3) of Block Ninety Six (96) according to the official plat of said townsite of Fairbanks more particularly described as follows:

Commencing at a point on the North end line of said Lot 3 on the 7th Avenue in the Town of Fairbanks, which said point is 55′ from the North West corner of said Lot 3; thence East along the North end line of said Lot 65.1′ to the North East corner thereof; thence continuing East along the North end line of said Lot 2, 10′; thence South 79.25′ along a line parallel to the West side line of said Lot 2; thence West along a line parallel to the North end line of said Lot 2, 10′ to the East side line of said Lot 3; thence South along said East side line of Lot 3, 79.25′ to the South East corner thereof on 8th Avenue; thence West along the South end line of said Lot 3 to a point which is 55′ from the South West corner of said Lot; thence North along a line parallel to the West side line of

said Lot 3 to the point of beginning, together with all buildings.

IX.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were in default in the payment of each, every and all of the four (4) promissory notes referred to hereinabove and had so been in default in the payment of said notes for a period in excess of six (6) months prior to the 8th day of November, 1951.

X.

On the 19th day of October, 1951, a contract of purchase and sale was executed by and between A. L. Kaye and Jean Kaye therein referred to as Sellers and Josephine Boussard therein referred to as Buyer, a copy of which said contract was introduced into evidence as Exhibit .., the subject of which said contract of sale was the real and personal property mortgaged by the Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks, all as more particularly described hereinabove and which said mortgage secured the promissory notes referred to hereinabove.

XI.

On said day and date the Vice-President of Plaintiff Bank at Fairbanks recognized Josephine Boussard as an excellent credit risk and did consider the credit of A. L. Kaye and Jean Kaye to be of a questionable character.

XII.

Said contract of sale provided for the payment by the Buyer, the Defendant Josephine Boussard, of Twenty Six Thousand Five Hundred ($26,500.000) Dollars, which said amount was to be paid in deferred monthly payments at the rate of Two Hundred ($200.00) Dollars per month, Fifteen Thousand ($15,000.00) Dollars of which said amount was to bear interest at the rate of eight (8%) per cent per annum on the deferred balance with the remaining Eleven Thousand and Five Hundred ($11,500.00) Dollars to bear interest at the rate of six (6%) per cent per annum on the deferred balance. All interest payments as provided by said contract were to be made in addition to the equal monthly payments of principal in the amount of Two Hundred ($200.00) Dollars.

XIII.

The escrow instructions attached to said contract of purchase and sale provided that the payment of principal and interest at the rate of eight (8%) per cent per annum on the gross amount of Fifteen Thousand ($15,000.00) Dollars should be, by the escrow holder, applied toward the liquidation of the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks. Said contract further provided that upon the liquidation of the Fifteen Thousand ($15,000.00) Dollar indebtedness of the Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks that the Defendant Josephine Boussard should continue to pay Two Hundred ($200.00) Dollars per month

to the credit of Defendants Kaye until such time as the Defendants A. L. Kaye and Jean Kaye had received the sum of Eleven Thousand Five Hundred ($11,500.00) Dollars, plus interest on said amount at the rate of six (6%) per cent per annum, said sum of Eleven Thousand Five Hundred ($11,-500.00) Dollars was, according to the terms and tenure of said contract, to bear interest at the rate of six (6%) per cent per annum commencing on the 19th day of October, 1951, said interest to be deposited to the account of the Defendants A. L. Kaye and Jean Kaye at the Bank of Fairbanks, Fairbanks, Alaska.

XIV.

Prior to the 19th day of October, 1951, the day and date upon which the Defendants and each of them executed the contract of purchase and sale to which reference is hereinabove made an agent of the Defendants Kaye discussed the terms and execution of said contract of sale with the Vice-President of the Bank of Fairbanks and did make unto said Vice-President of the Bank of Fairbanks a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions to be in said contract contained, to which said terms, conditions, covenants and provisions said Vice-President did consent.

XV.

On the 19th day of October, 1951, a copy of the contract of purchase and sale between the Defendants was placed in escrow in the Bank of Fair-

banks, the Plaintiff to this action, as Escrow No. 691, the Vice-President of said Bank having on said day and date examined said contract and assented thereto and said Vice-President did accept said contract, together with the escrow instructions thereto attached and the deed to the property hereinabove more particularly described, into escrow for collection.

XVI.

On the 9th day of November, 1951; the 10th day of December, 1951; the 11th day of February, 1952; the 10th day of March, 1952; and the 8th day of April, 1952, the Defendant Josephine Boussard did make payments to the Plaintiff Bank of Fairbanks in strict compliance with the provisions of the contract of purchase and sale referred to hereinabove, the same being the subject of escrow No. 691, said payments and the entirety thereof were applied directly by the Plaintiff Bank of Fairbanks toward the satisfaction of the four (4) promissory notes of Defendants A. L. Kaye and Jean Kaye, to which notes reference is made hereinabove.

XVII.

That from and after the 9th day of November, 1951, to and including the 10th day of August, 1954, the Defendant Josephine Boussard did make payments to the Plaintiff Bank of Fairbanks in strict compliance with the provisions of the contract of purchase and sale referred to hereinabove. Said contract of purchase and sale being the sub-

ject of escrow No. 691 in the Plaintiff Bank of Fairbanks.

XVIII.

The Plaintiff Bank of Fairbanks did hold in suspense the payments made by the Defendant Josephine Boussard on the 10th day of May; the 5th day of June; and the 11th day of July, 1952; until the 21st day of July, 1952, upon which said day and date a total of Eight Hundred Eighty Eight Dollars ($888.09) and nine cents was applied against the principal of the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks; and the sum of Sixty Nine Dollars ($69.73) and seventy three cents toward the payment of interest on said indebtedness. The failure of the Plaintiff Bank to apply the payments to the indebtedness of the Defendants A. L. Kaye and Jean Kaye was wrongful in that it allowed interest to accrue on said indebtedness during a period in which the Plaintiff Bank was in possession of funds which should have been applied to the liquidation of said indebtedness.

XIX.

That from and after the 9th day of August, 1952, to and including the 10th day of December, 1953, the Plaintiff Bank did, in contravention and disregard of the escrow instructions attached to the contract of purchase and sale hereinabove mentioned, the same being the subject of escrow No. 691, did deposit to the special account of A. L. Kaye and Jean Kaye seventeen (17) consecutive pay-

ments made by Defendant Josephine Boussard under the provisions of escrow No. 691; and said Plaintiff Bank of Fairbanks did further, in contravention and disregard of the aforementioned escrow instructions, fail to apply to the indebtedness of A. L. Kaye and Jean Kaye, by reason thereof, a total of Four Thousand One Hundred Forty Four Dollars ($4,144.71) seventy one cents; and did thereby further allow interest to accrue on the principal indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank on the four (4) promissory notes hereinabove mentioned, though funds were in the hands of the Plaintiff Bank for a partial liquidation of said indebtedness.

XX.

That from and after the month of January, 1954, and during each and every month thereafter to and including the month of August, 1954, the Plaintiff Bank accepted payments from the Defendant Josephine Boussard under the provisions of escrow No. 691 and did apply the proceeds of such payments directly toward the indebtedness of Defendants A. L. Kaye and Jean Kaye as evidenced by the promissory notes to which reference is made hereinabove.

And from the foregoing Findings of Fact, the Court does hereby make, enter and order the following, its

Conclusions of Law

I.

The Plaintiff Bank of Fairbanks did waive its

privilege to declare the promissory notes of the Defendants A. L. Kaye and Jean Kaye to be in default by its ratification of the provisions of the contract of purchase and sale, the subject of escrow No. 691, which said ratification and the acceptance of the payments by said Plaintiff Bank and the application of the proceeds thereof from and after the 9th day of November, 1951, did constitute a novation precluding the foreclosure of the mortgages held by the Bank securing the promissory notes of Defendants A. L. Kaye and Jean Kaye.

II.

That the Defendant Josephine Boussard is entitled to credit against the Fifteen Thousand ($15,000.00) Dollar indebtedness of A. L. Kaye and Jean Kaye to the Bank of Fairbanks in the amount of each payment of principal and interest made by said Defendant and of and from the date of receipt of each and every payment by the Plaintiff Bank.

III.

That the Plaintiff shall take nothing by or from its complaint.

Done in open Court this 23rd day of August, 1954.

/s/ HARRY E. PRATT,
District Judge.

Acknowledgment of Service attached.
Lodged August 20, 1954.
[Endorsed]: Filed August 23, 1954.

In the District Court for the District of Alaska,
Fourth Division

No. 7114

BANK OF FAIRBANKS, an Alaskan Banking Corporation, Plaintiff,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD, Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Harry E. Pratt, Judge of the District Court, District of Alaska, Fourth Division, in the Court Room of the above-entitled Court at Fairbanks, Alaska, on the 16th day of August, 1954; the Plaintiff appearing by and through its attorney, Maurice T. Johnson and the Defendants A. L. Kaye and Josephine Boussard appearing in person and by and through their attorney George B. McNabb, Jr.; and the Court having heard the testimony and having examined the evidence offered by the respective parties; and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law; and having directed that judgment be entered in accordance therewith,

Now Therefore, by reason of the law and the Findings aforesaid it is hereby Ordered, Adjudged and Decreed:

I.

That the Plaintiff shall take nothing by and from its complaint.

II.

That the Defendant Josephine Boussard is entitled to credit against the Fifteen Thousand ($15,000.00) Dollar indebtedness of A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks in the amount of each payment of principal and interest made by said Defendant and of and from the date of the receipt of each and every payment by the Plaintiff Bank.

III.

That the Defendants have and recover from the Plaintiff their costs to be assessed by the Clerk of this Court, together with a reasonable sum as and for the Defendants' attorney fee in the amount of $1,250.00.

Let Execution Issue ten (10) days from the date hereof.

Dated this 24th day of August, 1954.

/s/ HARRY E. PRATT,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the findings of fact and conclusions of law and judgment entered herein on the 24th day of August, 1954, and grant the plaintiff a new trial on the grounds that:

1. The findings of fact and conclusions of law and judgment are contrary to the evidence.

2. That the findings of fact and conclusions of law and judgment are contrary to law in that they fail wholly to recognize the well established rule that the alleged novation was completely without consideration and that therefore no estoppel or novation could work against the right of the plaintiff to foreclose its mortgage, which right existed at the time the said novation is presumed to have occurred.

Dated at Fairbanks, Alaska, this 1st day of September, 1954.

MAURICE T. JOHNSON
WILLIAM V. BOGGESS
/s/ MAURICE T. JOHNSON,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed September 2, 1954.

[Title of District Court and Cause.]

ORDER

The Plaintiff was represented by Maurice T. Johnson; the defendant by George B. McNabb.

The Court made certain statements to counsel regarding the Plaintiff's Motion for a New Trial.

Mr. Johnson waived argument on the Plaintiff's aforementioned motion.

Mr. McNabb presented a short argument resisting the Motion.

It was Ordered that the Motion be denied and counsel was directed to draw and submit an Order to the Court.

Entered December 7, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Bank of Fairbanks, an Alaskan banking corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the judgment entered in this action on the 24th day of August, 1954, and from the order entered on December 7, 1954, denying the plaintiff's motion for a new trial.

Dated at Fairbanks, Alaska, this 15th day of December, 1954.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS
/s/ By MAURICE T. JOHNSON,
Attorneys for Bank of Fairbanks, an Alaskan Banking corporation, Plaintiff Appellant.

Acknowledgment of Service attached.
[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

That we, Bank of Fairbanks, an Alaskan Corporation, as principal, and E. J. Rusing and John Contento, Jr., as sureties, are held and firmly bound unto A. L. Kaye, Jean Kaye and Josephine Boussard in the full sum of $5,000.00, to be paid to the said A. L. Kaye, Jean Kaye and Josephine Boussard, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of December, 1954.

Whereas, lately in the District Court for the District of Alaska, Fourth Division, in a suit pending in said Court, between Bank of Fairbanks, an Alaskan banking corporation, plaintiff, vs. A. L. Kaye, Jean Kaye and Josephine Boussard, defend-

ants, No. 7114, a judgment was rendered against the said Bank of Fairbanks, an Alaskan banking corporation, and the said Bank of Fairbanks, plaintiff, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such that if the said Bank of Fairbanks, plaintiff appellant, shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it failed to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

BANK OF FAIRBANKS,
/s/ By LESLIE NEILAND, President
[Seal] /s/ H. E. BOOTH, Secretary

[Seal] /s/ E. RUSING,
[Seal] /s/ JOHN CONTENTO, JR.,
Sureties

Acknowledged before me the day and year first above written.

[Seal] /s/ ALICE M. BAKER,
Notary Public in and for Alaska

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

E. J. Rusing and John Contento, Jr., being duly duly sworn, each for himself, deposes and says: That he is a freeholder in said District and is worth the sum of $5,000.00, exclusive of property exempt from execution and over and above all debts and liabilities.

/s/ E. J. RUSING,
/s/ JOHN CONTENTO, JR.

Subscribed and sworn to before me this 15th day of December, 1954.

[Seal] /s/ ALICE M. BAKER,
Notary Public in and for Alaska

Form of bond and sufficiency of sureties approved.

/s/ VERNON D. FORBES,
District Judge

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

On this day, pursuant to due notice, there came on to be heard Plaintiff's Motion for New Trial heretofore filed in the above entitled action. Plaintiff appeared by and through Maurice T. Johnson,

its attorney of record, and Defendants appeared by and through George B. McNabb, Jr., their attorney of record.

The Court, having heard the arguments of counsel and being fully advised in the premises, is of the opinion that said motion should be denied.

It is, therefore, accordingly ordered that Plaintiff's Motion for New Trial be, and the same is hereby denied.

Done at Fairbanks, Alaska, this 16th day of December, 1954.

/s/ VERNON D. FORBES,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed December 16, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL

For good cause shown;

It Is Hereby Ordered that the Plaintiff-Appellant have to and including the 23rd day of February, 1955, within which to file and docket its appeal in the Circuit Court of Appeals, Ninth Circuit, at San Francisco pursuant to Rule 73 (g), Federal Rules of Civil Procedure.

Done at Fairbanks, Alaska, this 5th day of January, 1955.

/s/ VERNON D. FORBES,
District Judge

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) (d) of the Federal Rules of Civil Procedure, the Plaintiff-Appellant hereby designates the complete record and all the proceedings had in the above entitled cause, including the stenographic transcript of the testimony and evidence in the action, together with the notice of appeal, supersedeas bond, the order granting an extension of time for filing and docketing appeal, and this designation of record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,
/s/ By MAURICE T. JOHNSON,
Attorneys for Bank of Fairbanks, an Alaskan Banking Corporation, Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed on the Designation of Record filed by the Plaintiff and the Appellant, viz.:

1. Complaint.
2. Summons.
3. Motion for Order directing Service of Summons by Publication.
4. Affidavit in Support of above Motion.
5. Order of Publication.
6. Motion for more definite Statement by deft. Boussard.
7. Answer and Affirmative Defenses of defdt. Boussard.
8. Answer of Defendants A. L. Kaye and Jean Kaye.
9. Motion for Judgment on the Pleadings by Plaintiff; Motion to strike Portions of the Answer of Defendant Josephine Boussard; Motion to make more definite and certain the Answer of the Defendant, Josephine Boussard.
10. Motion for Judgment on the Pleadings on the Answer of Defendants A. L. Kaye and Jean Kaye; Motion to strike Portions of the Answer of Defendants A. L. Kaye and Jean Kaye; Motion to make the Answer of A. L. Kaye and Jean Kaye more definite and certain.

11. Notice of Hearing by the Plaintiff.
12. Notice of Hearing by the Plaintiff.
13. Motion of Appearance of counsel and Withdrawal.
14. Minute Order in re substitution of counsel.
15. Hearing on Motions under No. 9 and 10, above.
16. Minute Order in re counsel for defdt. Kaye.
17. Reply to the Answer and Affirmative Defenses of Defendant Josephine Boussard.
18. Reply to the Answer of the Defendants A. L. Kaye and Jean Kaye.
19. Motion to strike by Defendants Kaye the Reply.
20. Order resetting trial.
21. Trial by Court.
22. Findings of Fact and Conclusions of Law.
23. Judgment.
24. Cost Bill.
25. Judgment Roll.
26. Motion for New Trial.
27. Execution and Marshal's Return.
28. Lien of Attorneys representing Defendant Boussard.
29. Notice of Hearing on Motion for New Trial.
30. Minute Order denying Motion for New Trial.
31. Notice of Appeal.
32. Supersedeas Bond.
33. Signed Order Denying Motion for New Trial.
34. Signed Order extending Time to docket cause.
35. Designation of Contents of Record on Appeal.

In brown manilla envelope: Plaintiff's Exhibits "A" to "K", incl.; Defendants' Exhibits 1 to 5, incl.

Transcript of Record, separately bound, pages No. 1 to 186.

Witness my hand and the seal of the above-entitled Court this 8th day of February, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 7114—Civil

BANK OF FAIRBANKS, an Alaskan Banking Corporation, Plaintiff,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD, Defendants.

TRANSCRIPT OF PROCEEDINGS

August 16, 17 and 18, 1954
Fairbanks, Alaska

Before: Hon. Harry E. Pratt, District Judge.

Apparances: Maurice T. Johnson, of Fairbanks, Alaska, attorney for the Plaintiff. George B. McNabb, Jr., of Fairbanks, Alaska, attorney for Defendants A. L. Kaye and Jean Kaye. Robert J. Mc-

Nealy, of Fairbanks, Alaska, attorney for Defendant Josephine Boussard. [1*]

Be It Remembered, that at 10:00 a.m., upon the 16th day of August, 1954, the trial of this cause, No. 7114, was begun, plaintiff and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for the trial in the case of Bank of Fairbanks vs. Kaye, et al, 7114.

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the court; Your Honor, we have on file here a motion to strike the pleading of the Bank of Fairbanks which is entitled a reply to the answer of defendants, A. L. Kaye and Jean Kaye. I would request that we dispose of that motion before we proceed with this matter, your Honor.

The Court: What was the motion?

Mr. McNabb: We filed, Judge, a motion to strike the reply or the pleading of the Bank of Fairbanks which is entitled a reply to the answer of defendants A. L. Kaye and Jean Kaye.

The Court: I will deny the motion.

Mr. McNabb: Well, your Honor, I would like to be heard on that matter if I may, please.

The Court: Well, I am just wondering. This is,

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* Page numbers appearing at top of page of original Reporter's Transcript of Record

doesn't seem to be a motion. It is a reply and it is your motion against the reply.

Mr. McNabb: Yes, Judge, that is correct, sir. We filed a [3] motion to strike that reply.

The Court: Well, I will hear you.

Mr. McNabb: I would like to call the court's attention to Rule 7(a) of the Federal Rules of Civil Procedure and more particularly to Section 243 of Barron and Holtzoff which is written concerning that very rule and sub-paragraph of the rule, and on Page 401 of Volume I of Barron and Holtzoff it says affirmative defenses included in the answer do not necessitate a reply nor is a reply permitted to such answer, and there are a number of cases cited, Judge, and it continues to say unless the court orders a reply, and there again cites a number of cases, it would appear from a reading of Barron and Holtzoff nor the sections that I have quoted to the court, and there are a number of cases set out here, Judge, that a reply is not permitted unless the court does in fact order such a reply. For that reason, we feel that this reply should be stricken. The replies are allowed for the purpose of setting up defenses to cross-claims and counter-claims and matters brought out by third party plaintiffs, and in this instance there is no cross-complaint or no counter-claim, and we feel that that answer is not properly before the court, or reply, rather.

The Court: Well, it seems to me that in this case, in order to clarify the issues it is necessary to have that reply on file. It is for your benefit,

entirely for your benefit I would say, so I will consider this reply as ordered by the [4] court and deny your motion.

Mr. McNabb: Very well.

Mr. Johnson: Mr. Bailey.

RALPH C. BAILEY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Johnson): State your name, please.

A. Ralph C. Bailey.

Q. Where do you live, Mr. Bailey?

A. 1325 - 6th Street, Fairbanks.

Q. What is your business or occupation?

A. Banking.

Q. With whom are you connected?

A. Bank of Fairbanks.

Q. Is that the plaintiff in this case?

A. It is.

Q. In what capacity are you connected with the plaintiff? A. Vice-President.

Q. And have you occupied that position for some time? A. I have.

Q. Are you acquainted with A. L. Kaye?

A. I am.

Q. Jean Kaye? A. I am. [5]

Q. And are you acquainted with Josephine Boussard? A. Yes.

Q. The defendants in this case? A. Yes.

Q. Are you also, or do you know whether or

(Testimony of Ralph C. Bailey.)

not the Bank of Fairbanks has filed its last annual report with the Territorial Auditor?

A. They have.

Mr. McNabb: I object to that as being—(Interrupted).

Mr. Bailey: They have.

Mr. McNabb: That it calls for—just a moment, now, Ralph. It is not the best evidence. I object to it on that ground.

Mr. Johnson: It has been admitted by all the defendants, if the court please.

Mr. McNabb: I objected on the ground it calls for a conclusion and it is not the best evidence, your Honor.

Mr. Johnson: If the court please, it has been admitted by both defendants, all of the defendants, both the Kaye's and Josephine Boussard have admitted the allegations of Paragraph I.

The Court: Well, it is necessary for the Bank to plead and prove that point where it is the plaintiff, not where it is the defendant. The Bank is the plaintiff here so the rule that I have just stated would be in force so I will sustain the objection.

Q. (By Mr. Johnson): Do you have in your possession a letter from the Territorial Auditor?

A. I do.

Clerk of Court: Plaintiff's Identification No. 1.

(Letter dated March 1, 1954 from Auditor of Alaska, Juneau, addressed to Bank of Fairbanks was marked Plaintiff's Identification No. 1.)

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification 1, will ask you to tell what that is, if you know?

A. It is a receipt which acknowledges the annual report filed with the Territory.

Mr. McNabb: Just a moment, now, Ralph. I am going to object to that testimony, your Honor, on the ground that the instrument itself is the best evidence.

The Court: Objection sustained.

Mr. McNabb: Move that answer be stricken, your Honor.

The Court: It may be stricken.

Q. (By Mr. Johnson): Will you tell what that purports to be?

Mr. McNabb: Same objection.

The Court: Same ruling.

Q. (By Mr. Johnson): Where did you get that?

Mr. McNabb: Same objection, your Honor.

The Court: Objection overruled.

A. I got it from Neil Moore, Auditor of the Territory of Alaska.

Mr. McNabb: Now I object to that as not the best evidence. Hearsay, no proper foundation having been laid for it, calls for a conclusion, move that the answer be stricken.

The Court: Are you offering the exhibit?

Mr. Johnson: Well, I am trying to identify it is all, if the court please.

The Court: Well, I think the certificate is admissible in itself, judicial notice.

(Testimony of Ralph C. Bailey.)

Mr. Johnson: Very well. I now offer in evidence Plaintiff's Identification 1, which is a statement of the Auditor of the Territory of Alaska.

Mr. McNabb: Just a moment, I am going to object to it, your Honor, on the grounds it has not been properly identified.

The Court: In what respect?

Mr. McNabb: Well, there is a signature here which purports to be that of Neil F. Moore as the Auditor of Alaska. That signature has not been verified. The instrument isn't identified by anyone, no proper foundation laid for its admission.

The Court: Objection overruled. It may be admitted. [8]

Clerk of Court: Plaintiff's Exhibit "A".

(Plaintiff's Identification No. 1 was received in evidence as Plaintiff's Exhibit "A".)

Q. (By Mr. Johnson): During the past few years have you had business dealings on, or has the Bank of Fairbanks had business dealings with A. L. Kaye and Jean Kaye? A. They have.

Q. And have these business dealings consisted of loans secured by mortgages?

A. They have.

Q. Do you recall when the first such mortgage was executed?

Mr. McNabb: I am going to object to that as calling for a conclusion, not the best evidence.

The Court: Objection sustained.

Clerk of Court: Plaintiff's Identification No. 2.

(Testimony of Ralph C. Bailey.)

(Mortgage dated May 8, 1945, was marked Plaintiff's Identification No. 2.)

Clerk of Court: Plaintiff's Identification No. 3.

(Mortgage dated November 22, 1948 was marked Plaintiff's Identification No. 3.)

Clerk of Court: Plaintiff's Identification No. 4.

(Mortgage dated January 30, 1950 was marked Plaintiff's Identification No. 4.) [9]

Clerk of Court: And Plaintiff's Identification No. 5.

(Mortgage dated February 3, 1951 was marked Plaintiff's Identification No. 5.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification 2, will ask you what that is, if you know? A. It is a mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye.

Q. And is that an executed copy of the mortgage? A. It is.

Q. Is it in the same condition now as it was at the time it was signed, approximately?

A. It is.

Q. And was that given to secure a loan?

A. It was.

Q. Do you have the note which is secured by that mortgage? A. I have.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 6.

(Mortgage Note dated May 8, 1945 was marked Plaintiff's Identification No. 6.)

Q. (By Mr. Johnson): Show you Plaintiff's

(Testimony of Ralph C. Bailey.)

Identification No. 6, will ask you what that is? [10]

A. Original note.

Q. Secured by the mortgage which you are holding there?

Mr. McNabb: What mortgage are you holding?

Mr. Johnson: Plaintiff's Identification No. 2.

Q. (By Mr. Johnson): And were those instruments signed on the days that they bear date?

A. They were.

Q. Can you tell what date that was?

A. May 8, 1945.

Mr. Johnson: We now offer Plaintiff's Identification 2 and 6, if the court please.

Mr. McNabb: May I ask this witness a question or two, your Honor, in reference to these items.

Cross Examination

Q. (By Mr. McNabb): How many notes were signed on the 8th day of May, 1945 by A. L. Kaye and Jean Kaye, if you know, Mr. Bailey?

A. I do not know.

Mr. Johnson: We don't see that that is proper in questioning on this matter.

Mr. McNabb: They are attempting to admit two notes here signed on the same day, each for ten thousand dollars. They appear to bear regular or proper signatures by A. L. Kaye or by Jean Kaye.

Mr. Johnson: All of the executions of these [11] instruments have been admitted, your Honor, in the answer of the defendants. I don't see they are in any position to question it.

(Testimony of Ralph C. Bailey.)

The Court: All right, you are objecting to his question?

Mr. Johnson: Yes.

The Court: I will sustain the objection.

Q. (By Mr. McNabb): Mr. Bailey, is Plaintiff's Identification No. 6, that is a ten thousand dollar note, is that identification a copy of the note which is attached to the Plaintiff's Identification No. 2?

A. It is. This is the original note. This is the copy.

Q. The note which is attached to the copy is a mortgage then? A. That's right.

Clerk of Court: Keep your voice up, Ralph, please.

Mr. Bailey: That is correct.

Q. (By Mr. McNabb): And though this is or appears to be an original signature which is on Plaintiff's Identification No. 2, this is not, you are not admitting in evidence at this time two ten thousand dollar notes, but one original and one copy; is that correct? A. That's right. [12]

Mr. McNabb: No objection to the admission of those identifications.

The Court: Be admitted.

Clerk of Court: Identification No. 2 is Plaintiff's Exhibit "B" and Identification No. 6 is Plaintiff's Exhibit "C".

(Plaintiff's Identification No. 2 was received in evidence as Plaintiff's Exhibit "B".)

(Testimony of Ralph C. Bailey.)

(Plaintiff's Identification No. 6 was received in evidence as Plaintiff's Exhibit "C")

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 3, and ask you what that is, if you know? A. Chattel mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye, A. L. Kaye, attorney in fact.

Q. And anyone else on it?

A. And Phillip A. Johnson.

Q. Do you have a note which is secured by that mortgage? A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 7.

(Mortgage Note dated November 22, 1948, was marked Plaintiff's Identification No. 7.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 7, and ask you what that is?

A. It is a mortgage note.

Q. Is that, by whom is it signed?

A. A. L. Kaye, Jean Kaye by A. L. Kaye, attorney in fact.

Q. And is it in the same condition now as it was at the time it was signed practically?

A. It is.

Q. Is that note secured by the mortgage which is identified as Plaintiff's Identification 3?

A. It is.

Mr. Johnson: We now offer Plaintiff's Identification No. 3 and 7, if the court please.

Mr. McNabb: No objection, your Honor.

(Testimony of Ralph C. Bailey.)

The Court: It will be admitted.

Clerk of Court: Identification No. 3 is Plaintiff's Exhibit "D" and Identification No. 7 is Plaintiff's Exhibit "E".

(Plaintiff's Identification No. 3 was received in evidence as Plaintiff's Exhibit "D".)

(Plaintiff's Identification No. 7 was received in evidence as Plaintiff's Exhibit "E".) [14]

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 4, will ask you what that is, if you know? A. Mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye and R. C. Bailey, at that time cashier.

Q. And do you have a note secured by that mortgage in your possession? A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 8.

(Mortgage Note dated January 30, 1950, was marked Plaintiff's Identification No. 8.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 8 and will ask you what that is?

A. This is a mortgage note signed by A. L. Kaye and Jean Kaye.

Q. Is that secured by the mortgage there which you have marked Plaintiff's Identification 4?

A. It is.

Q. And is it in the same condition now practically as when it was signed? A. It is. [15]

(Testimony of Ralph C. Bailey.)

Mr. Johnson: We will offer in evidence Plaintiff's Identifications 4 and 8.

Mr. McNabb: No objection.

The Court: It may be admitted.

Clerk of Court: Identification No. 4 is Plaintiff's Exhibit "F" and Identification No. 8 is Plaintiff's Exhibit "G".

(Plaintiff's Identification No. 4 was received in evidence as Plaintiff's Exhibit "F".)

(Plaintiff's Identification No. 8 was received in evidence as Plaintiff's Exhibit "G".)

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 5, will ask you what that is, if you know?

A. Real chattel mortgage.

Q. Signed by whom?

A. A. L. Kaye, Jean Kaye by A. L. Kaye, attorney in fact, and R. C. Bailey, at that time Vice-president.

Q. And do you have a note in your possession which is secured by that mortgage? A. I do.

Q. Will you produce it?

Clerk of Court: Plaintiff's Identification No. 9.

(Mortgage Note dated February 3, 1951, was marked Plaintiff's Identification No. 9.) [16]

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 9, ask you what that is?

A. Mortgage note.

Q. Signed by whom?

A. A. L. Kaye and A. L. Kaye attorney in fact for Jean Kaye.

(Testimony of Ralph C. Bailey.)

Q. And is it in the same condition now as it was when it was signed, practically?

A. Yes.

Mr. Johnson: We would like to offer in evidence Plaintiff's Identifications 5 and 9, if the court please.

Mr. McNabb: No objection.

The Court: It may be admitted.

Clerk of Court: Identification No. 5 is Plaintiff's Exhibit "H" and Identification No. 9 is Plaintiff's Exhibit "I".

(Plaintiff's Identification No. 5 was received in evidence as Plaintiff's Exhibit "H".)

(Plaintiff's Identification No. 9 was received in evidence as Plaintiff's Exhibit "I".)

Clerk of Court: There is one of those that isn't marked, Mr. Johnson. Identification 9 hasn't got the Exhibit number on it.

Mr. Johnson: Oh, I beg your pardon. [17]

Q. (By Mr. Johnson): Mr. Bailey, have you had occasion to compute the amount of principal and interest due on Plaintiff's Exhibit "C", "E", "G", and "I"? A. I have.

Q. Will you tell the court what that is in each instance?

Mr. McNabb: I am going to object to that as having no bearing upon the issues of this case, no proper foundation laid for it, your Honor.

Mr. Johnson: I think, if the court please, that he certainly has the right to tell what is due and

(Testimony of Ralph C. Bailey.)

owing on each of the notes. That is in issue in the case.

Mr. McNabb: That question is not in issue here.

Mr. Johnson: Well, it has been denied in each of the answers. I would say it was an issue.

The Court: Objection overruled.

Q. (By Mr. Johnson): Will you tell the court, how much is due and owing on each of those notes, as of today, in principal and interest?

A. Note dated May 8, 1945, principal five hundred forty-six dollars, eighty-seven cents.

Mr. McNabb: Now just a moment, Ralph, please. What is the number of that note?

Mr. Bailey: Identification—(Interrupted)

Mr. Johnson: Exhibit it would be. [18]

Mr. Bailey: "C".

Mr. McNabb: That is note M-39?

Mr. Bailey: That is our number, yes.

Q. (By Mr. Johnson): Five hundred forty-six dollars, eighty-seven cents in principal?

A. That's right.

Q. And have you computed the interest to date?

A. To date four dollars, forty-nine cents.

Q. Now on the next one?

A. Note dated November 22, 1948, Exhibit "E", principal unpaid balance forty one hundred dollars, interest to date, thirty-three dollars, seventy-one cents. Note dated January 30, 1950, Exhibit "G", five thousand dollars is the unpaid principal, interest to date forty-one dollars, eleven cents. Note dated February 3, 1951, Exhibit "I", principal un-

(Testimony of Ralph C. Bailey.)

paid balance eleven hundred fifty dollars, sixty-two cents, interest to date nine dollars, forty-five cents.

Q. Is that amount, are these respective amounts now due and owing on these notes?

A. To date, yes, sir.

Q. Is the Bank of Fairbanks the owner and holder of the notes and mortgages to which you have just, about which you have just testified?

A. They are.

Mr. Johnson: You may cross examine. [19]

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, I believe that this action was instituted on the 21st day of April 1952, an action to foreclose these mortgages. I will show you now Plaintiff's Identification No. 6 which is a promissory note apparently your number, that is bank's number M-39, a note in the amount of ten thousand dollars and I will ask you how long prior to the institution of this action there has been no payment made on this note. The balance on it, as I recall, there was nine hundred for quite a long length of time, was it not?

A. That is correct.

Q. On what date was the balance of that note reduced to nine hundred dollars?

A. That was a series of payments from June 11, 1945 to——

The Court: A little louder, please.

Mr. Bailey: It was a series of payments received

(Testimony of Ralph C. Bailey.)

from June 11, 1945 being the first one, down to nine hundred which was June 3, 1949.

Q. And from June the 3rd, 1949, how long was it until a payment was made on that note?

A. Principal payment?

Q. Yes. A. February 20, 1954.

Q. So then from June of '49 until February '54 there was no payments made? [20]

A. No principal payments.

Q. No principal payment, and then therefore, at the time that this action was filed in April of '52 there had been no payment made on that note for more than two years, or nearly three years, is that right? A. That's right.

Q. Now, there have been some payments made on the interest on this note, has there not?

A. There has.

Q. Do you know who made those payments?

A. Yes.

Q. Who made them? A. A. L. Kaye.

Q. He made those payments in accordance with this instrument, did he?

A. Well, that's right. Well, not exactly. I mean, the note calls for interest quarterly.

Q. I say though, Mr. Kaye has made the payments as are indicated on this note?

A. That's right.

Q. In what fashion did he make those payments? A. Several fashions.

Q. Well, let me ask you this, the note indicates that on the 18th of July, of 1954 there was a pay-

(Testimony of Ralph C. Bailey.)

ment in the amount of three dollars, sixty-four cents applied toward the interest on this note. Now, how did Mr. Kaye make that payment? [21]

A. I did not receive the payment myself. However, it was by one method on that, proceeds received on a certain escrow held by the Bank of Fairbanks to be applied to the note.

Q. And what escrow is that?

A. Without having the record, I can't quote it.

Q. Do you know the parties to that escrow?

A. I do.

Q. Who are they?

A. Josephine Boussard as purchaser of a piece of real estate and A. L. Kaye as the seller.

Q. Is that the same piece of real estate that is subject to the mortgages which you are here presently attempting to foreclose? A. It is.

Q. Now, there have been, I will show you now then Plaintiff's Exhibit "E" which is a note apparently in the sum of sixty-three hundred dollars, your note M-180 dated the 22nd day of November, 1948. That note provides that it is to be paid in five hundred dollars per month installments from what date, when was the first installment to be paid on that note? A. December 22, 1948.

Q. Was that installment made? A. No.

Q. Did you ever receive a five hundred dollar installment on that note, payment on the principal?

A. No. [22]

Q. It was never paid in accordance with its terms at all? A. It was not.

(Testimony of Ralph C. Bailey.)

Q. What is the unpaid balance of that note as of this date? A. Forty-one hundred.

Q. When did you first receive a payment on the principal of that note? A. April 28, 1950.

Q. How many, in what amount was that payment? A. Five hundred dollars.

Q. And how many of those payments did you receive?

A. Five three hundred dollar payments.

Q. Let me ask you this now, on the 9th day of November, 1951, how far in default was that note?

A. What date again, please?

Q. The 19th of November, 1951?

A. Forty-one hundred dollars.

Q. And that is the present amount in which that note is in default, has not been altered since that date? A. That's right.

Q. Is the interest current on that obligation now? A. Yes.

Q. Do you know was the interest current on that obligation on the 19th of November, 1951?

A. Yes. [23]

Q. It was. It was far in default in principal?

A. Right.

Q. By a period of several years, never had been paid in accordance with its terms so far as principal was concerned, had it? A. No.

Q. Now, I will show you Plaintiff's Exhibit "G" which is your note number 422. This is a note in the amount of five thousand dollars dated the 30th day of January 1950 and calls for an install-

(Testimony of Ralph C. Bailey.)

ment payment of one thousand dollars on or before the 1st of December, 1950; according to the schedule of payments on that instrument was that payment made? A. No, it was not.

Q. Have any payments on principal been made on that obligation? A. No.

Q. I note here however on the 11th day of December, 1953, I think perhaps we should go back. One the 21st day of December, 1950 there was paid one hundred dollars as interest on that note. That is the first substantial or sizeable payment that you received as interest; do you know the source of that payment or the source of the funds for that payment?

A. Paid by Kaye, but how I cannot answer. I do not know.

Q. How do you know that Mr. Kaye made the payment? A. That I cannot answer. [24]

Q. Then you don't know that Mr. Kaye did in fact make the payment?

A. I would assume so.

Q. But you don't know. When was this contract between Mr. and Mrs. Kaye and Josephine Boussard executed?

A. I do not remember. I do not have the papers.

Q. You could get those papers though, could you not? A. Yes, I could.

Q. Now then, now the Plaintiff's Exhibit "I" is bank note number M-483, a five thousand dollar note, and dated February the 3rd, 1951. Mr. Bailey, according to the schedule of payments here, the

(Testimony of Ralph C. Bailey.)

first payment on principal of that note was made November 9, 1951, in the amount of six hundred six dollars, sixty-seven cents and since that time payments have been made regularly on the principal of the note as well as the interest. Do you know who has made those payments?

A. Yes. Mr. Kaye one way or the other. There are several ways that he can make these payments, but indirectly Kaye makes the payments.

Q. Indirectly?

A. Directly or indirectly. There are several ways to acquire funds to make the payments on the note.

Q. Now then, let me ask you this, do you know of your own knowledge whether Mr. Kaye has ever since the 9th day of November 1951, do you know whether since the 9th of November '51 Mr. Kaye has ever come to your bank and made any payments [25] of principal or interest?

A. No, I do not know.

Q. Well, will not your records disclose that?

A. No, because there are several ways we can receive the payments and Mr. Kaye can come in and make the payments himself direct, they could be received from a certain escrow by the sale of this property.

Q. Mr. Bailey, let me ask that in another fashion. Do you not know that since the 9th day of November of 1951 that Mr. Kaye has not come to your bank and made any payments by cash or by check on any one of these four notes?

A. I don't know.

(Testimony of Ralph C. Bailey.)

Q. You know that he has not, don't you?

A. No, I don't know that.

Q. Will your records or the records of the bank indicate whether or not you have received any cash or any checks from Mr. Kaye to apply to these notes?

Mr. Johnson: If the court please, it seems to me that he is beginning to argue with the witness. These exhibits have been introduced. They are identified and they are admitted in evidence. They are the bank's records showing these payments. We object, not proper cross examination.

The Court: Objection overruled.

Q. (By Mr. McNabb): Won't your records so indicate, Ralph?

A. No, I can't tell whether Mr. Kaye came directly to [26] the window and paid me cash in it, or we received funds from other instruments. I did not handle all the transactions. We have other employes that handle them. Therefore, I cannot answer your question.

Q. You don't know? A. No.

Q. Can you tell us, Ralph—(Interrupted)

The Court: Would you like a recess for a few minutes now?

Mr. McNabb: Yes, your Honor.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 10:50 a.m., the court took a recess until 11:00 a.m., at which time it reconvened and the trial of this cause was resumed.)

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further

Cross Examination

The Court: Counsel ready to proceed?

Mr. McNabb: Defendant is ready, your Honor.

Mr. Johnson: Plaintiff is ready.

Q. (By Mr. McNabb): Now, Mr. Bailey, I will hand you Plaintiff's Exhibit "E". That was a note dated November 22nd, 1948, is that right, sir?

A. That's right. [27]

Q. Payable in installments of five hundred dollars per month, is that correct, sir?

A. Correct.

Q. The note is for sixty-three hundred, is that right? A. It is.

Q. The last payment on that note was December 21st, 1950, is that correct? A. It is.

Q. May I see the instrument, please. Mr. Bailey, this instrument, a schedule of payments made on this note which is Plaintiff's Exhibit "E", is that schedule of payments correct? A. It is.

Q. The note indicates, I believe, that between the 16th day of March, 1951, and the 11th day of, the 9th day of November, 1951 that no interest was paid, is that correct, sir?

A. Would you repeat, please?

Q. There was no interest paid on that note between the 16th day of March and the 9th day of November, is that correct? A. Of what year?

(Testimony of Ralph C. Bailey.)

Q. 1951? And the 9th day of November, '51, no interest was paid on it?

A. Yes, there was. There was interest received in March 1, 1951, and then the next interest received was in October 1, 1951.

Q. What are these dates here then?

A. These are the dates that we received it. These are [28] the dates that the interest was received. These are the dates that the interest was paid to.

Q. Yes, this column interest was paid to, it is clearly designated on the notes?

A. That's right.

Q. This is the date that the payments were made in a column headed date?

A. Right.

Q. Then here March 16, '51, that is when you received an interest payment, is it not?

A. That's right.

Q. There was no interest paid then between the 16th day of March '51 and the 9th day of November 1951, is that correct?

A. That is right.

Q. All right, and there had been no payment as against the principal since the 21st day of December of 1950? A. That's right.

Q. Do you know the source of the funds that made the payment on the interest on the 9th day of November of 1951?

A. Not without checking the files.

Q. You can secure that information for us?

(Testimony of Ralph C. Bailey.)

A. I believe we can.

Q. You will do that this afternoon or prior to the time that the court convenes again at two o'clock? A. Yes, sir.

Q. I hand you now Plaintiff's Exhibit "I" which is a [29] note in the amount of five thousand dollars, is that not correct?

A. That is right.

Q. Dated February 3, 1951?

A. That is right.

Q. Payable in one year?

A. That's right.

Q. What is the present outstanding balance of that note?

A. Eleven hundred fifty dollars, sixty-two cents.

The Court: Eleven did you say?

Mr. Bailey: Eleven hundred.

Q. (By Mr. McNabb): When was the first payment on the principal of that note?

A. November 9, 1951.

Q. Do you know the source of that payment, sir?

A. Not without checking the records, other records we have at the bank.

Q. That will, you will do that before two o'clock?

A. Yes.

Q. May I see the instrument again, please. I hand you now Plaintiff's Exhibit "G", that is a note dated January 30, 1950, is it not?

A. It is.

Q. In the principal amount of five thousand dollars? [30] A. It is.

(Testimony of Ralph C. Bailey.)

Q. Payable December the 31st, 1950?

A. Yes.

Q. There was no payment ever made on the principal of that note, was there?

A. There was not.

Q. Was the interest on that obligation ever brought current? A. It was.

Q. When was the interest brought current?

A. July 10, 1954, and various other intervals.

Q. Let me ask you this then, when was the interest first brought current on that note?

A. March 1, 1950.

Q. When was the next time that the interest was brought current on it?

A. April first, 1950.

Q. Was there ever any interest paid for a period of longer than one month?

A. Yes, from October 1, 1950 to January 1, 1951.

Q. How much was that payment?

A. One hundred dollars.

Q. And then subsequently there was another hundred dollar payment, was there not?

A. There was.

Q. When was that? [31]

A. April 1st, 1951.

Q. And that paid the interest some days in advance, I believe? A. That's right.

Q. And the interest is now current on that obligation? A. It is as of this date.

Q. Now then, I will hand you Plaintiff's Ex-

(Testimony of Ralph C. Bailey.)

hibit "C", that is a note in the principal amount of ten thousand dollars, is it not?

A. Originally, yes.

Q. Dated May 8, 1945? A. That's right.

Q. Provides for payment in three hundred dollar monthly installments, is that correct?

A. Correct.

Q. The last payment on the principal of that note was 6-3-49, is that correct?

A. Not the last one.

Q. When the note was reduced to a principal balance of nine hundred dollars?

A. June 3, 1949.

Q. I was correct then? A. Yes.

Q. The interest on that obligation was well is current? A. It is.

Q. Now, Mr. Bailey, I will hand you the entirety of the [32] four notes upon which this action is based and ask you if it is not true that on the 9th day of November of 1951, the date that all of those notes were in default in both principal and interest—(Interrupted)

A. No, not both principal and interest.

Q. Which of the notes were not current in principal on the 9th day of November of 1951?

A. Exhibit "I", note dated February 3, 1951, interest current, principal in default. I beg your pardon. I stand to be correct. It was current on that note.

Q. The entire note?

A. Yes, in this particular case.

(Testimony of Ralph C. Bailey.)

Q. That is Exhibit "I", a five thousand dollar note payable in one year? A. That's right.

Q. And that was current as to both principal and interest on the 9th day of November, '51?

A. That's right.

Q. And was made so by, in what fashion?

A. Well, the interest was current on the, the note itself was not due and would not have been due until February 3, 1952.

Q. Well, was it current on the 8th day of November of 1951? A. Yes, sir.

Q. Well, what is this then, a payment up to the 8th day; [33] it was made current by a payment on the 9th day of November, was it not?

A. No, it was current before because it was current on October 13, 1951. He paid interest to October 8, 1951, and the note was current because as you will see our notes call for quarterly interest payments and it was within the quarter.

Q. There had been nothing paid on the principal at that time, had there been? A. No.

Q. And how much was paid on the 9th day of November on that note?

A. Thirty-three dollars, thirty-three cents in interest and six hundred six dollars, sixty-seven cents on the principal.

Q. Do you know who made that payment, sir?

A. Not without checking the records.

Q. And you can do that? A. I will try.

Q. So this note then was made current in principal and interest, that is Exhibit "I" was made

(Testimony of Ralph C. Bailey.)

current in principal and interest on the 9th day of November, '51, is that right? A. Correct.

Q. That is a note which would have been due by its terms on the 2nd day of February, 1952?

A. That's right.

Q. And up until the 9th day of November nothing had been paid on the principal of the obligation? [34] A. No.

Q. And on the 9th day of November six hundred six dollars, sixty-seven cents was applied toward the retirement of that note?

A. That's right.

Q. The first payment that had been made to that date? A. That's right.

Q. Between now and two o'clock you will ascertain for the court who made the payment or from what source the money came?

A. I will try.

Q. Now let me ask you, Mr. Bailey, I think perhaps I did, let me ask you this, was there not on the 9th day of November, 1951, a total of six hundred forty dollars applied toward the retirement of one or all of these four obligations?

A. It would appear so.

Q. Well, is there any payment on any of these other four on the 9th day of November, other three, I'm sorry? A. No, there isn't.

Q. Notes "G", "E" and "C", that is Exhibits "C", "G" and "E" were very badly in default or certainly in default in both principal and interest on November 9, 1951, were they not?

(Testimony of Ralph C. Bailey.)

A. That's right.

Q. Mr. Bailey, I believe you are familiar with a contract of sale between A. L. Kaye and Jean Kaye and the defendant in this action, Josephine Boussard, are you not, sir? [35] A. Yes.

Q. And that is in escrow in your bank?

A. Yes.

Q. I will ask you if you know whether Josephine Boussard is a party to more than one escrow in your bank, sir? A. Not off-hand, no.

Clerk of Court: Defendant's Identification A.

(Installment Payment Receipt Book was marked Defendant's Identification A.)

Q. (By Mr. McNabb): Mr. Bailey, I will hand you Defendant's Identification A and ask you if you know what that is, please?

A. Installment repayment book.

Q. Indicating what financial institution?

A. Indicating Bank of Fairbanks, it is a receipt book.

Q. As an escrow agent?

A. That's right, escrow number 691.

Q. In whose name?

A. Josephine Boussard.

Q. Now, I will, I call your attention to the first payment as is evidenced in that book, what date is that? A. November 9, 1951.

Q. What was the total amount that was paid on that day, Mr. Bailey?

Mr. Johnson: If the court please, until the identification is admitted in evidence it is, and wouldn't

(Testimony of Ralph C. Bailey.)

be [36] the best evidence. I don't see any justification for the witness—(Interrupted)

The Court: I think we could save time also if the whole matter were put in evidence, if we can.

Mr. McNabb: Yes, your Honor. Your Honor, I am going to move to admit Defendant's Identification A.

Mr. Johnson: We object on the grounds that it is incompetent, irrelevant and immaterial, and hasn't been properly identified or the proper foundation hasn't been laid for its introduction. There is no showing that the bank in any way was connected with these escrow as a party to any agreement other than as an escrow holder, and there is no showing that the parties here or the property is the same that is involved in this action.

The Court: Inasmuch as he is objecting to it now, Mr. McNabb, I think I will have to lay the foundation.

Mr. McNabb: Very well, Judge.

Q. (By Mr. McNabb): Mr. Bailey, this payment or schedule of payments indicates, I believe, that, well, you tell me what payment was made if any on the 9th day of November, 1951?

Mr. Johnson: We object to that, if the court please, on the grounds that it is incompetent, irrelevant and immaterial until this is admitted in evidence.

The Court: I think you should show the execution of the instrument first before the details are brought in. [37]

(Testimony of Ralph C. Bailey.)

Q. (By Mr. McNabb): Mr. Bailey, do you know the subject of the property which that payment schedule or that receipt book concerns?

A. I believe it concerns an escrow held by our bank and the original of which is placed in our permanent files.

Q. You know that it does, don't you?

A. I say I know providing this is the book that goes along with it. That I cannot prove until I see my records.

Q. You also no doubt know that it is the same property upon which you are here today attempting to foreclose a mortgage?

Mr. Johnson: We object to that as not being the best evidence.

The Court: Objection overruled.

Q. (By Mr. McNabb): Isn't that right, Ralph?

A. I can't tell. Anybody could make this out. Without checking my permanent record of the bank.

Q. No, of course, it isn't. Would you prefer to do that?

A. I prefer to use my own records.

Mr. McNabb: May we have a recess now until 1:30 during which time Mr. Bailey will have an opportunity to check his records.

The Court: We will adjourn until 1:30, but this case that we are trying now will be adjourned until two o'clock.

Clerk of Court: Court is at recess until 1:30. [38]

(Thereupon, at 11:30 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the recess.)

The Court: Bank of Fairbanks vs. Kaye; are you ready to continue the case?

Mr. Johnson: The plaintiff is ready, your Honor.

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, were you able to discover in your files or in the records of the bank any substantiating factors concerning this installment payment receipt book, number 691, about which I questioned you prior to the recess?

A. I think so.

Q. Do you know, do you now know then what this book is about? A. Yes.

Q. Who are the parties or what is that payment receipt book a part of, if you know?

A. Our escrow 691.

Q. And what is that, if you know?

A. It involves a selling and the purchase of a piece [39] of property by two other parties.

Q. And who are the parties to that?

A. A. L. Kaye and Jean Kaye, sellers, and Josephine Boussard as purchaser.

(Testimony of Ralph C. Bailey.)

The Court: What is the name of the purchaser?

Mr. Bailey: Josephine Boussard.

Q. (By Mr. McNabb): Now, Mr. Bailey, do you know whether the property involved in that escrow or that contract of sale is the property which is mortgaged to the Bank of Fairbanks and the subject of this action? A. It is.

Q. The same property? A. Yes.

The Court: Those escrow payments on the date they bear?

Mr. Bailey: I have not checked them back, your Honor, between ours and the payment book. I have not checked each individual payment but that payment book does represent this escrow on the fact of it.

Q. (By Mr. McNabb): You have reason to believe that the payments as applied against this contract of purchase and sale between each of the parties defendant here is represented in this book?

A. I have reason to think so. I wouldn't—(Interrupted)

Q. You do not know positively? [40]

A. Not without checking it out.

Q. But you do have there the record of the payments?

A. This is the bank's permanent record, yes.

Q. And do you know the date upon which the contract between Mr. and Mrs. Kaye, the defendants here, and Josephine Boussard, the other defendant, was executed.

Mr. Johnson: Well, if the court please, we be-

(Testimony of Ralph C. Bailey.)

lieve that the contract is the best evidence. We object.

The Court: Has that been put in evidence, yet?

Mr. McNabb: No, it has not, your Honor.

The Court: You might offer it and see if there is any objection to it.

Mr. McNabb: Let me have this. I don't know what this instrument is.

Clerk of Court: Defendant's Identification B.

(Contract of Purchase and Sale was marked Defendant's Identification B.)

Q. (By Mr. McNabb): I have had the instrument which you just handed me marked as Defendant's Identification B; do you know what that is?

A. Yes, it is a Contract of Purchase and Sale by and between A. L. Kaye and Jean Kaye, husband and wife, hereinafter called sellers, and Josephine Boussard, hereinafter called buyer.

Q. Is that contract and the deed to that property the subject of escrow number 691 in the Bank of Fairbanks? [41] A. It is.

Q. When was that contract executed, if you know?

A. The 9th day of October, 1951.

Q. When was it placed in escrow in your bank, if you know?

A. According to the letter here, October 9, 1951.

Q. According to your records, or the records of the bank, was there not the sum of six hundred forty dollars paid to the Bank of Fairbanks by

(Testimony of Ralph C. Bailey.)

reason of the existence of that contract on the 9th day of November, 1951? A. There was.

Q. What was done with the six hundred forty dollars? A. May I have the notes.

Q. These notes?

A. No, the original notes, the exhibits that have been placed in the court. They were applied to note dated February 3, 1951, our mortgage number 483, the note in the amount of five thousand dollars. It is Exhibit "I", six hundred six dollars, sixty-seven cents applied to principal and thirty-three dollars, thirty-three cents applied to interest.

Q. That was the note of Mr. Kaye?

A. That is correct.

Q. Who made that payment?

A. We did. The Bank of Fairbanks, pardon me.

Q. How did the Bank of Fairbanks come into possession of the six hundred forty dollars? [42]

A. These funds were received on this escrow 691 to liquidate the principal and interest, and we in turn have authority to apply these funds.

Q. Now, Ralph, just answer my questions. Confine yourself to answering. We are not interested in any long dissertations. How did you come into the money; how did the Bank of Fairbanks acquire possession of the six hundred forty dollars on the 9th day of November, 1951?

A. They were paid into the bank on escrow 691.

Q. By whom?

A. Presumably Josephine Boussard.

Q. And the entirety of it was paid on one of

(Testimony of Ralph C. Bailey.)

thes four notes? A. It was.

Q. And at that time that was the first payment that had ever been applied toward the payment of that, the principal of that particular note, was it not? A. Yes.

Q. You received an additional payment on escrow number 691 on the 10th day of December, 1951; the amount paid was five hundred thirty dollars, fifty cents. Is that correct?

A. On December 10, 1951, yes.

Q. What was done with that money?

A. Applied on note of five thousand dollars dated February 3, 1951, our mortgage note number 483, five hundred one dollars, twenty-one cents against principal and twenty-nine [43] dollars, twenty-nine cents against interest.

The Court: What is the exhibit number of that?

Mr. Bailey: Exhibit "I".

Q. (By Mr. McNabb): That is the same note against which the November 9 payment was credited? A. That is correct.

Q. And the entirety of each of those two payments was applied toward the indebtedness of Mr. Kaye to the bank? A. That's right.

Q. On February 11, 1952 you received three hundred four dollars, thirty-three cents; is that correct? A. Correct.

Q. What became of the proceeds of that payment?

A. Two hundred forty-seven dollars, forty-three cents was applied to the principal of Exhibit "I"

(Testimony of Ralph C. Bailey.)

and fifty-one dollars, ninety cents was applied to interest.

Q. Fifty-one dollars, ninety cents?

A. That is correct, according to the records.

Q. Mr. Bailey, what became of the other five dollars?

A. That I would have to check out here, and I would like to have some time to do so. According to the records here it says go to service charges, and the reason for it I can't tell you without checking further.

Q. Now then, on March 10th of 1952, you received a payment of three hundred fifty-two dollars, seventeen cents, did you not? [44]

A. My records do not indicate that amount of money.

Q. On the 10th day of March, 1952 the same note that we have been talking about, that is Exhibit "I" was credited against principal in the sum of two hundred seventy dollars, thirty-seven cents, and with interest in the amount of twenty-four dollars, thirty cents on the 10th day of March?

A. That's right.

Q. Your escrow records in this transaction 691 indicate I believe on the 10th day of March that a total of three hundred fifty-two dollars seventeen cents was paid? A. That is correct.

Q. What happened to the other fifty-seven dollars, fifty cents—that amount, Mr. Bailey, if I may interrupt you, that represents interest on Mr. Kaye's equity in the property in the amount of

(Testimony of Ralph C. Bailey.)

eleven thousand five hundred dollars at the rate of six per cent per annum for one month, does it not?

A. That's right, but what I did with it, that is what I am trying to establish now. Evidently I have not enough material here to establish it.

Q. I will tell you. A. All right.

Q. Two days later, and on the 12th day of March 1952 you applied that money against principal on our Exhibit "I", 3-12-52?

A. That's right.

Q. There wasn't any payment made by Josephine Boussard [45] on that date at all, was there?

A. That's right now that you call it to my attion.

Q. So you applied on that date as you had on each previous occasion the interest of Mr. Kaye as it accelerated on his eleven thousand five as is provided by the contract? A. That's correct.

Q. O. K. On April the 8th the bank received the sum of three hundred fifty dollars, eighty-four cents, did it not? A. It did.

Q. What did the bank do with that money?

A. Three hundred twenty-eight dollars, seventy-three cents was applied to Exhibit "I", twenty-two dollars, eleven cents was applied to interest to Exhibit "I".

Q. Now, in each of these instances, Mr. Kaye was entitled to fifty-seven dollars, fifty cents interest on his money under that contract, was he not?

A. Not the way we determined it, no.

(Testimony of Ralph C. Bailey.)

Q. Well, now, that is quite obvious, but it was, wasn't it?

Mr. Johnson: If the court please, I think that he is arguing with the witness. He has the escrow and contract there. That should speak for itself. If he wants to get the, if he wants to get it in evidence let him offer it. We have no objection.

The Court: Yes, don't indulge in mere argument.

Mr. McNabb: Very well, sir. [46]

Q. (By Mr. McNabb): Ralph, the contract, the subject of this escrow that we are talking about, 691, provided for the payment to Mr. Kaye of the sum of eleven thousand five hundred; is that correct?

A. I would have to re-read the contract. I can't remember what was in it.

Q. Now, you just told me that the fifty-seven dollar fifty cent amounted to six per cent of eleven five for one month? A. That's right.

Q. Then the contract does provide for the six per cent interest on Mr. Kaye's eleven five?

A. Yes, it provides for it, the contract does.

Q. And on each one of the payments that was made from the 9th day of November up to the one we are now discussing, that is 9 November to 8 April Mr. Kaye was entitled to receive under the terms of that contract fifty-seven dollars, fifty cents a month?

A. We did not understand it that way.

Q. Be that as it may, the fifty-seven, fifty each month was applied against these notes in this in-

(Testimony of Ralph C. Bailey.)

stance, note "I"? A. That's right.

Q. That is Exhibit "I", Plaintiff's Exhibit "I"?

A. That's right.

Q. Now, in April, this April 8th payment in the amount of three hundred fifty dollars, eighty-four cents was applied in what fashion, sir?

A. State that amount again, please?

Q. Three hundred fifty dollars, eighty-four cents. That is April 8. You will find, Ralph, that that was applied on the 16th day of April to your Exhibit "I". A. Yes, that's right.

Q. Paid on the 8th and applied on the 16th. Now, your escrow records will show that there was a payment made on May 10th on the escrow?

A. That's right.

Q. Another on June 5? A. Yes.

Q. Another on July 11? A. That's right.

Q. Another on July 21, or on July 21 you distributed the proceeds of those payments?

A. That's right.

Q. How much money did you distribute on the 21st of July and where did it go?

A. Eight hundred eighty-eight dollars and nine cents was applied to principal on Exhibit "I"; sixty-nine dollars and seventy-three cents applied to interest on Exhibit "I".

Q. Is that all of the money that you collected from [48] May the 10th, June the 5th, and July 11th?

A. No, there is an overage there. It appears I have put one hundred dollars to interest. It is in

(Testimony of Ralph C. Bailey.)

the record some place, I believe. I haven't the time to dig it out.

Q. Well, now, something happened to eighty-six dollars, sixty-nine cents? A. Yes, sir.

Q. You accepted on this escrow between the 10th of May '52 and the 11th of July '52 the gross amount of one thousand forty-four dollars, fifty-one cents, and you applied nine hundred fifty-seven dollars eighty-two cents to Exhibit "I"?

A. That's right.

Q. Now, we have caught you short five dollars on February 11, and now I want to know what happened to eighty-six dollars, sixty-nine cents?

A. I could not answer that until I checked further.

Q. Mr. Bailey, in what amount was Mr. Kaye indebted to the Bank of Fairbanks on the 8th day of November, 1951?

A. Twenty thousand dollars.

Q. Well, now, that isn't correct, Ralph?

A. Beg pardon?

Q. It was five thousand dollars on M-423, Exhibit "G", against which there had been no payment on the principal? A. Right.

Q. There was only nine hundred on Exhibit "C", which is M-39? [49] A. Right.

Q. Then there was another five thousand dollars due on Exhibit "I", which is M-483, and there was forty-eight hundred on M-180, which is Exhibit "E"?

(Testimony of Ralph C. Bailey.)

A. My records here indicate here there was forty-one hundred.

Q. Forty-one hundred, so there really wasn't twenty thousand, it was only fifteen thousand even?

A. I beg your pardon. That's right.

Q. And each of those notes at that time, that is on the 8th of November '51, each was past due. No one was not past due; all of them were past due with the exception of Exhibit "I"?

A. That's right.

Q. Which was the last of the notes, that correct? A. That's right.

Q. And some of them had been past due since 1948? A. That's right.

Q. And not even the interest was current on those notes as of the 8th day of November, '48?

A. Correct.

Q. I beg your pardon now, '51, November the 8th '51 they were in default in principal and interest both, with the exception of Exhibit "I"?

A. Yes.

Q. Now, do not your records indicate that Josephine [50] Boussard, who purchased the interest of Mr. and Mrs. Kaye had been quite prompt in making all of the payments due under that contract? A. That's right.

Q. Since the 9th day of November '51?

A. Yes.

Q. Can you tell the court how much she had paid in on that contract since the 9th day of November, 1951? A. Including interest?

Q. Yes.

(Testimony of Ralph C. Bailey.)

A. I would like to have an adding machine.

Q. Well, she has paid, not counting the last payment, she has paid sixty-six hundred dollars on the principal, hasn't she?

A. I don't know without checking.

Q. I want you, Ralph, we can take a recess here in a moment, I ask you if it is not true that since the 9th day of November of 1951 Josephine Boussard has paid you the sum of eleven thousand fifty-three dollars and thirty-seven cents as principal and interest on this property, eleven thousand fifty-three dollars thirty-seven cents on notes that had been in default since 1948?

Mr. McNabb: Your Honor, may we have a ten minute recess at this time.

The Court: Will that be enough?

Mr. Bailey: Not likely. [51]

The Court: How about twenty minutes. Is that more like it?

Mr. Bailey: I will try to get it out in twenty minutes.

The Court: We had better take thirty.

Mr. Bailey: Your Honor, it will take actually longer than that because we will have to go back and check each one of these payments out where they have been credited or given directly to Kaye, if there were any, and find out where this money has gone to and that is half a day's work the way this is set up.

The Court: Well then, as I understand you, you

(Testimony of Ralph C. Bailey.)

need a recess from now until about tomorrow morning, is that right?

Mr. Bailey: It will take, well, just about, your Honor. It will take at least two hours. There are payments over a period here of approximately, a little over three years.

The Court: We will take a recess until tomorrow morning at ten o'clock.

Mr. McNabb: Judge, for the purpose of saving a little time here, may we just go into this matter a little further and perhaps save time tomorrow, sir?

The Court: Well, yes, I am certainly in favor of any saving of time.

Mr. McNabb: Well, if we can have a five or ten minute recess now and save that much time.

Clerk of Court: Court is recessed for five minutes. [52]

(Thereupon a short recess was taken.)

The Court: Are you ready to proceed?

Mr. Johnson: We are ready.

RALPH C. BAILEY

the witness under examination at the time the recess was taken resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Now, Mr. Bailey, on the 8th day of November, 1951, Mr. Kaye was indebted to the bank, that is the defendants Kaye were indebted to the bank fifteen thousand dollars; you

(Testimony of Ralph C. Bailey.)

have already testified to that, that that is correct, is it not? A. Yes.

Q. Now then, on the date that, or the complaint which you filed in this action on the 21st day of April of 1952, does not ask a judgment in the amount of fifteen thousand dollars; do you know whether Mr. Kaye had paid you anything between those two dates?

A. According to the notes, yes.

Q. But you have testified now that the payments which were received under escrow 691 were applied against those notes? A. Yes.

Q. Now then, did Mr. Kaye pay you anything?

A. No. Over and above the escrow I presume you mean.

Q. Could you tell us with any sort of convenience the [53] amount of money that has been paid or received by the bank after Josephine Boussard started making her payments on the 9th of November '51, and the 21st day of April when this action was instituted?

Mr. Johnson: If the court please, it seems to me that that is part of the information the witness wanted time to compute and I don't think that the question is fair at all. I object to it.

Mr. McNabb: Well, if he needs the time that is all right. We will go into that.

Q. (By Mr. McNabb): Do you need some time in which to make that computation, Mr. Bailey?

A. The only records I have are what is in my hand and according to these records here I received

(Testimony of Ralph C. Bailey.)

no money from Mr. Kaye other than moneys received through escrow 691.

Q. That doesn't answer my question, Ralph. I asked you if you know how much you received from escrow 691 from the first day that Josephine Boussard made any payments, that is on the 9th of November, and the date upon which this action was filed, that is the 21st of April?

A. No, not without computing.

Q. Do you need to take some extra time to do that or could you make an accurate and quick computation?

A. May I ask between what dates?

Q. Well, it would be between the 9th of November and [54] including the 8th of April?

A. Approximately two thousand one hundred seventy dollars, eighty-four cents.

Q. Two thousand one hundred seventy-seven dollars, eighty-four cents, isn't it, Ralph?

A. I could have made an error.

Q. Six forty and three fifty, three hundred four dollars thirty-three cents, three hundred two dollars, seventeen cents, and three hundred fifty dollars, eighty-four cents?

A. You are reading a combination of the principal and interest. I have it broken down separately.

Q. Separate?

A. There is a differential of five dollars here and possibly another five dollars or two that I missed in computing here.

(Testimony of Ralph C. Bailey.)

Q. So in approximately five months the fifteen thousand dollar indebtedness of Mr. Kaye has been reduced by the sum of twenty-one hundred seventy dollars? A. That's right.

Q. By the bank having applied the proceeds of escrow number 691 against it?

A. That is correct.

Q. Now then, we discussed for only a moment the matter of the fifty-seven dollars fifty cents interest which there seems to be a conflict concerning. The contract provides that Mr. Kaye is to receive six per cent interest. [55]

Mr. Johnson: Now if the court please, I object to counsel testifying. The contract isn't even in evidence yet. He has merely identified it. He hasn't even offered it.

The Court: Objection overruled.

Q. (By Mr. McNabb): The contract provides, Mr. Bailey, that Mr. Kaye is to receive six per cent interest on eleven thousand five hundred, that is six per cent per annum; is that not correct?

A. That's right.

Q. Now then, a few moments ago you told me that that was not your interpretation, did you not so testify?

A. If I did it was in error in the way the question was put to me because on the eleven thousand five hundred he is entitled to six per cent interest. However, the bank is entitled to the six per cent interest on eleven thousand five hundred.

Q. Mr. Kaye is entitled to receive it and the

(Testimony of Ralph C. Bailey.)

bank is entitled to get it? A. That's correct.

Q. And you have been getting it?

A. That's right.

Q. And you have since the 9th day of November of 1951 when Josephine Boussard first started making payments under escrow 691, the bank then has received the entirety of the money she has paid under that escrow?

A. I cannot answer that question.

Q. Let me ask you this, has Mr. Kaye received any of it? [56]

A. I cannot answer that until I compute the disbursements of funds received.

Q. Let us for a moment now go again to Exhibit "I", that exhibit will show that on the 21st day of July, 7-12-52, there was applied against the principal the gross amount of eight hundred eighty-eight dollars, nine cents, and against interest the sum of sixty-nine dollars, seventy-three cents. Will you please verify those figures against the payment schedule on Exhibit "I"? A. That's correct.

Q. Now, the sum of eighty-six dollars, sixty-nine cents excepted, the sum of principal and interest as applied against Exhibit "I" on the 21st of July represents the payment made by Josephine Boussard on the 10th of May, the 5th of June and the 11th of July?

A. According to my records that's correct.

Q. In what suspense or other account was that money held during the period that each of the payments were made?

(Testimony of Ralph C. Bailey.)

A. I cannot answer that question today. I will have to think about it. I don't know.

Q. Do you, you do, of course, know that from the day upon which the lady made her first payment until the action was filed, this foreclosure action, you immediately applied all of the proceeds, all of the moneys that she paid directly toward the retirement of the secured indebtedness of Mr. and Mrs. Kaye to the bank, do you not? [57]

A. It appears that way.

Q. Now, if there is any doubt in your mind I want you to look at identification, or Exhibit No. "I" and testify positively?

A. Would you restate your question again, please.

Q. All of the moneys paid by Josephine Boussard on escrow 691 between the 9th day of November 1951, to and including her payment on the 8th day of April 1952 were applied directly toward the retirement of the secured indebtedness owed by Leo Kaye and Jean Kaye to the Bank of Fairbanks? A. No.

Q. What sum was not so applied?

A. That is why we ask for computation.

Q. I will qualify my statement to the five dollars which we were short, was there any other money that was not so applied?

A. From my figuring here, yes, there is a difference here some place and we have to find it.

Q. Are you talking about the eighty-six, sixty-nine? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. That was between the 10th day of May and the 21st of July, Ralph? A. I am confused.

Q. I am not.

A. Well, no, I am asking you what dates are you saying, clear back to November 9, '51, until——?

Q. Until the action was filed on the 21st of April. You see, there was the November, December, February, March and April payments, the ones that we were just talking about in the sum of twenty-one hundred seventy dollars, eighty-four cents, or thereabouts. You and I this morning went very carefully through these payments, and the payment schedule on Exhibit "I" and concluded at that time that all of the moneys paid under escrow 691 were applied to Exhibit "I". A. Yeah.

Q. That's correct, isn't it?

A. That's correct.

Q. Now then nothing happened, that is after the April 8th payment you filed this action on the 21st of April. The last payment was on the 8th day of April and you have applied the entirety of that payment, three hundred fifty dollars, eighty-four cents, you applied that to the debt of Mr. Kaye as evidenced by Exhibit "I". That was on the 8th of April. Your receipt on Exhibit "I" shows that that was applied on the 16th. There was a lapse of eight days. We don't know why, but that occurred. After the 8th of April payment, thirteen days later you filed an action to foreclose the mortgages. That was the 21st of April. On May the 10th, June 5th, July

(Testimony of Ralph C. Bailey.)

11th, you did not apply the payment. Do you know why you didn't apply them?

A. No, I don't right offhand. That is one thing I want to substantiate.

Q. Do you know then why you did apply them on July 21st? [59]

A. Also I will have to substantiate that.

Q. When did you first become aware of the existence in escrow in your bank of escrow number 691?

A. The date that we received the escrow in the bank.

Q. You knew about it then, on that day?

A. Some official in the bank knew about it, yeah.

Q. You did not know about it?

A. Well, I think I did. I am not positive. That is a number of years ago.

Q. Do you know who deposited the deed and the contract in escrow? A. I did not remember.

Q. You have no recollection of that having been done?

A. No, not that particular transaction. No.

Q. Do you have any recollection of having discussed it on the day that it was put in the bank with any person?

A. I possibly could have, but offhand, no, I can't recollect what happened on that particular day.

Q. Do you know whether Mr. Kaye since escrow number 691 was deposited in your bank has ever made a payment on any of these notes?

A. That I cannot determine until I make a com-

(Testimony of Ralph C. Bailey.)

plete check. I don't think that he has. I mean directly.

Q. Your records indicate, however, that the payments have been made consistently on 691?

A. Yes, without checking any further. I haven't checked [60] it out through month by month, but it appears to be.

Q. And the balance of our very controversial Exhibit "I", which was due in the amount of five thousand dollars, or was not due nor quite due when Josephine Boussard took over, the unpaid balance of that has been reduced from the sum of five thousand dollars to eleven hundred fifty dollars as of the 18th of July, correct?

A. According to the note, yes.

Q. Now, the note is the best evidence. You have no other evidence of the amount of the debt?

A. No, that's right.

Q. So that is it whether it is according to the note or not? A. That's right.

Q. What date was that? A. As of July 18th.

Q. Do you know when the payment was made that, to the bank that was applied on the 18th against that note? A. 18th of July, '54.

Q. Yes, do you know when that payment was made?

A. According to the records, it was made July 10, '54, applied against the note.

Q. Applied the same day? A. Yes.

Q. Well, there is eight days difference, didn't you say the payment was made on the 18th? [61]

(Testimony of Ralph C. Bailey.)

A. Oh, I beg your pardon. That is correct. There is eight days difference which is not uncommon.

Q. Does that interest go on for those eight days?

A. It shouldn't.

Q. Well, I know it shouldn't, but does it? Is that like that elusive five bucks?

A. In this particular case it did.

Q. And so with the proceeds of the moneys that Josephine Boussard had been paying in here we have reduced that note to eleven hundred dollars or thereabouts. Nobody else but that lady has made any payments on the note, have they?

A. As I say, not to my knowledge.

Q. And your knowledge is pretty well correct on it, isn't it? You probably know more about this transaction than anybody else in this town, don't you, Ralph?

A. No, because I cannot, I don't remember these things, George.

Q. What?

A. I don't remember all these things. If anyone else has made any payments it is over and above, I don't know anything about it.

Q. You are pretty well sure where the money came from that made the payments though, aren't you? A. Pretty sure.

Q. And we are keeping the interest current on this Exhibit "E", still shows a forty-one hundred dollar balance, but the interest is current on it?

A. That's correct.

(Testimony of Ralph C. Bailey.)

Q. And we finally got around to working on this 1945 note, I thought it was 1948. This is 1945, Exhibit "C", that is the one that had nine hundred dollars balance, wasn't it, on the 9th of November, 1951. It was six years old then and now we have got it down to five hundred forty-six dollars, eighty-seven cents? A. That's correct.

Q. But the best we can say for Exhibit "G" is that the interest is current and the five thousand dollars is still due? A. That's right.

Q. So actually there is right now nothing like the sum of fifteen thousand dollars due on these instruments, is there? A. No.

Q. Eleven fifty on one, which is Exhibit "I"?

Mr. Johnson: It seems to me, your Honor, that this is entirely repetitious. The witness has already testified two or three times as to the amount due and owing at the present time and the instruments speak for themselves, and show that anyway.

The Court: Well, it is very difficult to get this case produced all at once. I will have to overrule the objection.

Q. (By Mr. McNabb): So we have five thousand due on Exhibit "G", Ralph? A. Yes.

Q. Five hundred forty-six, eighty-seven on Exhibit "C"? [63] A. That's correct.

Q. Forty-one hundred on, what was that, "E"?

A. Identification "B", Exhibit 1.

Q. Let's see "E"?

A. Oh, yeah, Exhibit "E".

Q. And eleven hundred fifty dollars and sixty-two cents on "I"?

(Testimony of Ralph C. Bailey.)

A. Eleven hundred fifty dollars, sixty-two cents on "I", correct.

Q. What?

A. Eleven hundred fifty dollars, sixty two cents on "I".

Q. Yeah, so we then have not fifteen thousand but ten thousand seven hundred ninety-seven dollars, forty-nine cents presently due if my computation is correct? A. Correct.

Q. Which amount has been, the fifteen thousand with which we started on the 9th has been reduced every month in the principal amount of two hundred as is provided in the contract of Josephine Boussard; is that not correct?

A. That's correct.

Q. Plus interest on the entirety of all of your secured indebtedness at eight per cent per annum; is that correct?

A. Yes and no. Some of these funds could have been diverted to his bank account and not applied against the notes, and I would rather not answer it the other way without computing this band checking it out. I have no way of knowing off-hand. [64]

Q. Do you know, Ralph, whether you didn't get the fifty-seven fifty every month, that is the money that Josephine Boussard paid?

A. I am not sure of that, George.

Q. It is going to take quite sometime to make these calculations. You don't know now then when we, these three months that is, May, June and July of 1952, when you didn't apply any of the

(Testimony of Ralph C. Bailey.)

proceeds for three months and then you did on the 21st of July applied them, you don't know whether that has occurred since that time or not?

A. It could have. I would have to check it over.

Q. But you don't know at this time?

A. No.

Q. In any event, since the 8th day of November, 1951, the total indebtedness on these particular four notes of Mr. Kaye's has been reduced by about forty-two hundred dollars on principal. It was fifteen thousand dollars. Now we have decided it is ten thousand seven hundred ninety-one?

A. Approximately, yes.

Q. About forty-two hundred, and you are sure in your own mind at any rate that Mr. Kaye didn't make any of those payments to you?

A. I am not sure.

Q. You can ascertain that for us at the same time you make these other calculations?

A. I believe I can. [65]

Q. Let me ask you this, if any of the money was not applied against this indebtedness of Mr. Kaye's to you, what became of it?

A. It could have gone several other places, three mainly.

Q. Is there not provision in the escrow instructions for the payment to be made to the bank?

A. There is a provision, yes. It can be made several different ways.

Q. If then two hundred a month plus interest on these four notes was not applied toward the

(Testimony of Ralph C. Bailey.)

liquidation of the four notes, that is Exhibits "G", "E", "C", and "I", then the bank acted contrary to its instructions?

A. I will have to answer that yes or no. It depends.

Q. Well now then, what became of it if it wasn't applied?

A. It could have gone into his bank account and taken out by a check, withdrawn *from* him before we had the opportunity to take it back out and apply it against the note.

Q. There was no cause for it to go into an account, was there?

A. That is our means of keeping records. As a rule on about ninety-nine per cent of our accounts that we receive that way, and a bank is entitled to do so according to law.

Q. But if it got in there in Mr. Kaye's account and he did withdraw it when the bank placed it into his account, the account, the bank acted contrary to the escrow instructions as [66] provided in escrow 691, did it not?

A. No, not necessarily.

Q. In addition to our two other mysteries, those being the five dollar shortage, the eighty-six, sixty-nine shortage, we have another. Apparently from the amounts due on the exhibits there still remains to be paid the sum of ten thousand seven hundred eighty-seven dollars, forty-nine cents. We started with an indebtedness of fifteen thousand. If two

(Testimony of Ralph C. Bailey.)

hundred a month has been paid for thirty-four months there has been a total of sixty-eight hundred which should have been applied against the interest and against the principal of those four notes. We are off again. I would like you when you make your calculations to tell us, if you will, what became of that money. Do you understand me, Ralph? A. Yes.

Q. Actually, interest excluded, there should be presently a balance of eighty-two hundred, if we were correct and I assume that these notes are correct there should have been a balance presently due on these four notes of eighty-two hundred. The notes themselves indicate a present indebtedness in the sum of ten thousand ninety-seven dollars, forty-nine cents. You became though almost immediately aware of the deposit in your bank of escrow number 691, practically at the same time it was placed there, didn't you? A. That's right.

Mr. McNabb: Well, we are prepared to excuse the [67] witness at this time, your Honor. That is, he has calculations to make and we have no further questions to ask him at this time, sir.

The Court: Very well, you wish to continue with this and get certain payments you want him to prepare himself on certain points this evening?

Mr. McNabb: That is correct.

The Court: Very well. We will take an adjournment then until ten o'clock tomorrow morning.

Mr. McNabb: I have one other witness that I could put on at this time. Of course, we are not in

our case. That would be entirely up to Mr. Johnson.

Mr. Johnson: I have been wondering all along, Mr. McNabb, whether—(Interrupted)

Mr. McNabb: Just answer the question. Do you have any objection to our putting on another witness?

Mr. Johnson: Yes, I do.

Mr. McNabb: That is all for today, Judge. Your Honor, Mr. Bailey is going to need these notes.

Mr. Bailey: I will need these exhibits, your Honor.

Mr. Johnson: I was just wondering why all this was going on. I assumed that he had assumed the burden.

Mr. McNabb: Just answer the question. Do you have any objection to our putting on a witness now?

Mr. Johnson: Yes, I do.

Clerk of Court: Court is adjourned until tomorrow morning at ten o'clock. [68]

(Thereupon, at 4:30 p.m., August 16, 1954, an adjournment was taken to 10:00 a.m., August 17, 1954.)

Be It Remembered that the trial of this cause was resumed at 10:00 a.m., August 17, 1954, plaintiff and defendants both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Counsel ready to proceed with the trial of Bank of Fairbanks vs. Kaye, 7114?

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well. Proceed.

RALPH C. BAILEY

the witness under examination at the time the adjournment was taken, resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, you came prepared this morning with your answers from your records concerning the matters which we discussed yesterday? Initially the five dollar shortage that developed to February 11, 1951?

A. That's right.

Q. Do you know what became of the five dollars?

A. It went into service charges.

Q. What service charge was that?

A. When an escrow is placed in the Bank of Fairbanks [69] for collection and we as a disinterested thir*ty* party, our charges are five dollars for placing that escrow in the bank. That was not collected at the time we received the escrow, but deducted from payments received against the escrow which we are entitled to do.

Q. Who was charged with that five dollars?

A. Kaye.

Q. Mr. Kaye was charged with it?

A. Yes, sir, from the proceeds of funds received on the escrow which is his money.

Q. Did you make Mr. Kaye a receipt for that five dollars or in what fashion did you advise him?

A. That I cannot answer. I cannot answer that because I did not make the entry.

Q. Well, from what records did you get it, your information concerning that five dollars?

(Testimony of Ralph C. Bailey.)

A. From the general ledger of the bank and it was credited to the same.

Q. Would there, was there any record in Mr. Kaye's account indicating that that five dollars was used by the bank for the purpose of—(Interrupted)

A. Only a notation on the escrow itself that it had not been collected.

Q. That it had not been collected?

A. That's right.

Q. The point is, of course, that it has been collected? [70]

A. After we received it, yes, but not previously.

Q. Well, a notation on the escrow that the five dollars had not been collected would have been false. The five dollars was collected and used by the bank for the purpose of, and applied as a charge against the escrow account.

A. You misunderstand. A notation on the escrow itself at the time of setting up the escrow in the bank that the five dollars had not been received and it was some time later that we took it from the proceeds of the funds coming in on the escrow.

Q. When did you make that five dollar charge?

A. February 11, 1951.

Q. Is that the notation?

A. That is the notation.

Clerk of Court: Defendant's Identification C.

(Credit Slip was marked Defendant's Identification C.)

Q. (By Mr. McNabb): This then is the original charge slip?

(Testimony of Ralph C. Bailey.)

A. No, George, you misunderstand. That is part of the general ledger record and a permanent record of the bank. In other words, when we received the five dollars, which is a debit, this credit offsets the debit and it goes to our general ledger, but this is the day that it was done.

Q. Josephine Boussard received credit for having paid this, did she not? [71]

A. Yes, she received credit.

Q. On the escrow 691?

A. That's right. That was charged against Kaye.

Q. And the entirety of the payment with the exception of the five dollars was credited against Mr. Kaye's indebtedness to the bank?

A. That's correct.

Mr. McNabb: I move the admission of Defendant's Identification C.

Mr. Johnson: We have no objection.

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "1".

(Defendant's Identification C was received in evidence as Defendant's Exhibit No. "1".)

Q. (By Mr. McNabb): Do you know, Mr. Bailey, why there was such a time elapsed between the date upon which the contract was placed in escrow as account number 691 and the date upon which that five dollar charge was made?

A. Failure of the teller to acquire it before that time.

Q. Oversight? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. Now then, can you tell us what became of the eighty-six dollars, sixty-nine cents? [72]

A. Yes. At that time there were three monthly payments received. The amounts of three hundred forty-eight dollars, seventeen cents—(Interrupted)

Q. Wait a minute now. Which one was that three hundred forty-eight, seventeen?

A. May 10, 1952.

Q. May 10, 1952 you received three hundred forty-nine dollars, fifty cents?

A. That's correct. June 5th, let's put it this way, May 10, 1952 we received three hundred forty-nine dollars, fifty cents; June 5th, 1952 we received three hundred forty-eight dollars, seventeen cents; and on July 11, 1952 we received three hundred forty-six dollars, eighty-four cents, making a total of one thousand forty-four dollars, fifty-one cents.

Q. Right.

A. On July 9, 1952, the three hundred forty-eight dollars seventeen cents and the three hundred forty-nine dollars, fifty cents was credited to Mr. Kaye's account.

Q. On what date was that? A. July 9th.

Q. To his account?

A. To the account, and on July 10, 1952 we credited the three hundred forty-six dollars, eighty four cents. On July—(Interrupted)

Q. Wait a minute, just a minute now. What was that later date? [73]

A. July 10. In the meantime these funds were being held in a cashier check form.

(Testimony of Ralph C. Bailey.)

Q. Now, Mr. Bailey, that July payment which you credited on the 10th, it wasn't paid until the 11th.

A. Well, all I can do is go by my records here. It could have been received.

Q. Well, I know but let's go by these records. All right, according to our records it was received on July 10, 1953.

A. Beg your pardon. You are correct. I cannot answer that question.

Q. So then our entire theory concerning these three payments must be off?

A. Not according to the records.

Q. But you can't do something with a payment on the 10th day of July that wasn't paid until the 11th day of July?

A. Well, I don't see how it happened. It must be some kind of an error.

Q. But still we have the very elusive question of eighty-six dollars, sixty-nine cents.

A. That's right.

Q. What became of that?

A. July 21st we ran through a debit memo against this account for nine hundred fifty-seven dollars, eighty-two cents.

Q. And you had received one thousand forty-four dollars, fifty-one cents? [74]

A. That's right, and the differential was eighty-six, sixty-nine, and it stayed in the bank account.

Q. Whose bank account? A. Mr. Kaye's.

Q. You told me you had been holding these two first payments in the cashier's check form?

(Testimony of Ralph C. Bailey.)

A. I did, but at that time when I credited the account, which made a balance here we saved them.

Q. What date did you do that?

A. July 9th.

Q. You didn't have that amount of money there?

A. On July 9th I did.

Q. You didn't either, you had one thousand forty-four, fifty-one, but not until the 11th of July?

A. That's right, but I received these payments May 10th, if you recall, and June 5th.

Q. Yes, sir, and July 11th?

A. And July 9th. All right, July 9th I had a deposit of six hundred ninety-seven, sixty-seven.

Q. That's correct, but we are talking about the difference between nine hundred fifty-seven dollars, eighty-two cents, which you started playing with on the 21st of July?

A. That's correct. It is in the bank account. Would you care to see the records.

Q. On what day did you do something with nine hundred fifty-seven dollars, eighty-two cents? [75]

A. July 21st.

Q. Any time prior to that? A. No.

Q. Where had that amount of money been held?

A. Well, up until July 9th and July 10th, according to my records, it was held in the form of a cashier's check from the bank.

Q. How much money was that check for?

A. One was for three hundred forty-eight seventeen, and one for three hundred fifty-nine fifty. The other, according to these records that I hold

(Testimony of Ralph C. Bailey.)

in my hand, not yours, three hundred forty-six, ninety-four.

Q. And you had held that money in what fashion?

A. In the form of a cashier's check that time.

Q. The entirety of it? A. That's correct.

Q. How much money was that cashier's check; what do your records indicate to be the amount of the cashier's check?

A. Three hundred forty-eight seventeen; three hundred forty-nine fifty; and three hundred forty-six, eighty-four. There are checks, not check.

Q. Three checks then? A. Three checks.

Q. And then what did you do with those three cashier's checks?

A. I placed them at different intervals to the bank [76] account of A. L. Kaye.

Q. When did you do that?

A. July 9th both three forty-eight seventeen and three forty-nine fifty. On July 10 three forty-six eighty-four.

Q. Which, of course, must be in error, must it not?

A. It is evidently so. I mean, but it is pretty hard for a man to go ahead a day and use the 11th when he did something on the 10th. That I cannot imagine, George, for the simple reason that I have tellers down there that handle this. I did not personally handle it.

Q. I know, but so you had these three cashier's checks? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. And on the 10th day of July you did what with those three cashier's checks?

A. Well, not on the 10th. On July 9th and 10th they were credited to the account of A. L. Kaye.

Q. What do you mean by credited them to the account of A. L. Kaye?

A. It went into his special account which we have set up for him.

Q. How long did they stay there, or did that amount of money stay there. That must have been the sum of one thousand forty-four dollars, fifty-one cents?

A. That's right, and it stayed there until July 21st when I withdrew a portion of those funds, which was nine hundred fifty-seven dollars, eighty-two cents leaving an unpaid [77] distribution on our part of eighty-six dollars, sixty-nine cents.

Q. Do you have any idea now why you withdrew only nine hundred fifty-seven dollars, eighty-two cents?

A. No, not offhand. Must have been a reason at the time.

The Court: Speak a little louder, please.

Mr. Bailey: Must have been a reason at the time.

Q. (By Mr. McNabb): Well, prior to that time you had been crediting to the indebtedness of Mr. Kaye and I assume in this instance you did that very thing. In fact, Exhibit "I" will indicate that on the 21st day of July you applied against that note the sum of nine hundred fifty-seven dollars, eighty-two cents, won't it? A. That's right.

(Testimony of Ralph C. Bailey.)

Q. To your knowledge could it have been anything other than a mathematical miscalculation that caused you to leave this eighty-six sixty-nine out?

A. No, I would say not, because we set up this bank account to run the funds through the bank account so we could have a permanent record, and many times if it is set up for the sole purpose, for that sole purpose many times we take even figures for it is easier to run through the bank on an even figure basis than it is for an odd figure.

Q. Well, nine fifty-seven eighty-two isn't an even [78] figure?

A. No, but I mean as far as the not applying certain funds to the notes.

Q. Is it your testimony then that in this instance a special account was set up for Mr. Kaye through which you ran the payments of Josephine Boussard on escrow 691? A. That's correct.

Q. And it was set up for that purpose?

A. That I would, I cannot answer. I do not remember how it came about.

Q. Do you know when that account was set up?

A. July 9, 1952.

Q. What do your records indicate to have been the balance of that account on July 9, 1952?

A. Six hundred ninety-seven dollars, sixty-seven cents.

Q. Just the entirety of the May 10 and June 5 payments? A. Yes.

Q. Then you subsequently placed in that same

(Testimony of Ralph C. Bailey.)

account the payment which was made on July the 11th, or the 10th as your records will indicate?

A. That's right.

Q. Just for the purpose of clarifying the record, Mr. Bailey, this is, of course, the Defendant's Identification A which is the payment book on escrow 691. I will ask you to examine that and tell me if any payments were credited there during the month of July? [79]

A. July 11th, 1952 and I imagine this is what has happened as far as the permanent records of the bank is concerned, the girl did not change her date on the machine and she was posting the 10th's work on the 11th but she left the 10th in.

Q. We are talking then about the same payment and certainly the same amount of money?

A. That's right.

Q. How was the withdrawal made on the 21st day of July 1952 from this special account of Mr. Kaye's? A. By a debit memo.

Q. By that you mean that the bank merely debited the account of Mr. Kaye?

A. That's right.

Q. He had nothing, no part, he played no part in the transaction at all?

A. No, only the, only according to the escrow instructions.

Q. When you say the escrow instructions now you are talking about this contract of purchase and sale which is Defendant's Identification B?

A. That's correct.

(Testimony of Ralph C. Bailey.)

Q. I believe that you brought that into court, did you not, Mr. Bailey? A. I did.

Q. Where has that been since the month of October of 1951?

A. It has been in our escrow file.

Q. Have you examined the signatures on that instrument?

A. I did not set it up. They appear to be all right.

Q. I mean, is that the signature of Mr. Kaye on that instrument? A. Yes.

Q. And of Mrs. Kaye?

A. Attorney in fact, A. L. Kaye.

Q. And of Josephine Boussard?

A. It is.

Mr. McNabb: I will move the admission of Defendant's Identification B, your Honor.

Mr. Johnson: We have no objection.

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "2".

(Defendant's Identification B was received in evidence as Defendant's Exhibit No. "2".)

Q. (By Mr. McNabb): Do you have the records of the A. L. Kaye special account with you, Mr. Bailey? A. I do have.

Q. What was the balance of that account immediately following the debit memo as of the 21st day of July 1952 at which time you debited that account for nine hundred fifty-seven eighty-two?

A. Eighty-six sixty-nine. [81]

Q. That is the difference between what you

(Testimony of Ralph C. Bailey.)

received in the May, June and July payments and what you debited the account for?

A. That's right.

Q. You have no explanation at all for your failure to have taken the other eighty-six sixty-nine? A. I do not recall.

Q. You don't recall whether you have an explanation for it or—(Interrupted)

A. No, I don't recall why I didn't take it.

Q. You did take the money or place the debit memo to that account by reason of the escrow instructions in this contract of purchase and sale?

A. That's right.

Q. Why had there not been a special account set up prior to the 9th day of July, if you know?

A. I cannot answer that, either.

Q. You had, according to the escrow instructions of this contract you had taken and applied to the indebtedness all of the preceding moneys in the sum of twenty-one hundred seventy dollars or thereabouts without the use and benefit of a special account? A. That's correct.

Q. You don't know why you set up the account at all?

A. Only that I felt like it at that particular time. If I recall correctly we felt like we should have it of record [82] where it cleared through an account and direct disposition because if the payments had been applied directly to the note, the note was paid off and went into Kaye's hand, which he is entitled to hold, we would have no record of

(Testimony of Ralph C. Bailey.)

the disposition of funds through the escrow at all.

Q. But your records as mine are quite complete as to what occurred between the time you received the first payment on November 9 and when you set up the special. In fact, we didn't get confused at all until you did set up this special account and then we went off eighty-nine dollars, sixty-nine cents worth. Everything rolled along in a quite merry fashion up until that special account popped in here; is that not correct? A. No.

Q. What is incorrect about it?

A. This is the way we elected to do it.

Q. But the time had elapsed from about the 8th day of October when you first received the escrow and the 9th day of July, November, December, January, February, March, April, May, June, July, nine months? A. That's correct.

Q. Do you know now how much has been paid by Josephine Boussard on this contract of sale to that date?

A. According to my records eleven thousand one hundred thirty-two dollars, four cents.

The Court: Give me that again, please. [83]

Mr. Bailey: Eleven thousand one hundred thirty-two dollars, four cents.

Q. (By Mr. McNabb): How many payments at two hundred a month, Ralph?

A. I didn't count the number of payments, but I have a total here of sixty-six hundred.

Q. Did you credit that account with the payment on July 10th of 1954? A. No.

(Testimony of Ralph C. Bailey.)

Q. So it is sixty-eight hundred?

A. Well, yes, I beg your pardon. We did on July 10th. I did not credit the account, but I received the money.

Q. You received the money so there have been sixty-eight hundred dollars paid at the rate of two hundred a month toward the principal?

A. No, my records indicate sixty-six hundred.

Q. Well, now, I think you will find that there have been thirty-four such payments made. Will you check it?

Mr. Bailey: May I have a recess.

The Court: Yes, we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon at 10:55 a.m., the court took a recess until 11:07 a.m., at which time it reconvened and the trial of this cause was resumed.)

RALPH C. BAILEY

the witness under examination at the time the recess was taken [84] resumed the stand for further

Cross Examination

The Court: Counsel ready to proceed with the trial?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): So have you now ascer-

(Testimony of Ralph C. Bailey.)

tained how many two hundred dollar payments have been applied to this contract, Mr. Bailey, since it was placed in your bank?

A. Well, two hundred dollar payments, there is a total of sixty-eight hundred dollars.

Q. Thirty-four?

A. Thirty-four payments.

Q. And they have been made each month from the time that the payment, or that contract was placed in escrow in your bank?

A. That is correct. However, to rectify the records, the first two installments were doubled, four hundred each, which in reality would make thirty-two payments.

Q. There have been thirty-two payments?

A. Two transactions—(Interrupted)

Q. A total of sixty-eight hundred has been paid?

A. That is correct.

Q. And each payment has been made in accordance with the provisions of the contract of sale, your escrow 691? [85] A. It has.

Q. And that contract provides for a payment to Mr. Kaye of fifty-seven dollars, fifty cents per month which is actually six per cent interest on eleven thousand five hundred?

A. That's right.

Q. And each of those payments have been made? A. They have.

Q. Thirty-four of those? A. Yes.

Q. Likewise, the contract provides for eight per cent interest per annum on the portion of the con-

(Testimony of Ralph C. Bailey.)

tract which was evidenced by the four promissory notes which you presently have in evidence here, is that not correct?

Mr. Johnson: We object to that, if the court please, as not being a fair statement of the evidence. The contract does not include, or as counsel intimates the contract of purchase and sale is not based upon the four notes that are being foreclosed. They simply are referred to by reference as being the basis upon which two hundred dollars a month of the contract of purchase and sale was to go to the bank for a specific purpose.

The Court: Well, you can clear that up if it isn't clear when you get to cross examining the witness. Objection overruled.

Q. (By Mr. McNabb): Will you answer the question then, Ralph? [86]

A. I got carried away, would you please state—(Interrupted)

Q. Let me withdraw that question and restate it. Each of the payments which were made provided for two hundred dollars which was to be applied directly toward the payment of principal. The contract also provided for the payment of interest at the rate of eight per cent per annum on a sum which was equal to the unpaid balance of the four promissory notes which were owed by Mr. Kaye and Mrs. Kaye to the Bank of Fairbanks; is that not correct?

A. That is a portion of it, yes.

Q. And so there was then paid two hundred

(Testimony of Ralph C. Bailey.)

dollars per month plus, at the very beginning of this contract eight per cent on fifteen thousand; is that not true?

A. Well, yes, that is a portion of it, but it is not all of it.

Q. What is the rest of it?

A. Well, the fifty-seven fifty and the two hundred and the interest. The fifty-seven fifty represents six per cent interest on the eleven thousand five hundred.

Q. That was Mr. Kaye's portion of the contract?

A. Well, yes and no. I mean the whole contract is Mr. Kaye's. It is not the Bank of Fairbanks.

Q. Now, you go ahead and tell your story. Each of us knows how it is.

A. You want me to tell it, how it is, how we understand [87] it, have interpreted it. The escrow was placed in the Bank. The amount of the escrow was originally twenty-six thousand five hundred.

Q. That was divided in what fashion?

A. It was divided fifteen thousand running at eight per cent.

The Court: How many thousand?

Mr. Bailey: Fifteen thousand carried eight per cent interest. Eleven thousand five hundred carried the rate of six per cent interest. It was a split escrow.

Q. (By Mr. McNabb): The fifteen thousand now, Ralph, that was what Mr. Kaye owed to the Bank of Fairbanks, wasn't it?

A. That has no bearing on the problem though.

(Testimony of Ralph C. Bailey.)

Q. That is true though, is it not?

A. That is what he owed us at that particular time.

Q. And that is where the money went, toward the reduction of the four notes in the amount of fifteen thousand?

A. What money are you speaking of?

Q. The money that you received, or the Bank received from Josephine Boussard?

A. All moneys received from Josephine Boussard went to liquidate this obligation supposedly.

Q. Well now, did it or didn't it?

A. Supposedly to this extent that part of it went in the bank account and I didn't get a chance to get ahold of it. [88]

Q. Whose fault was that?

A. Well, that was a clerical error in our banking institution.

Q. It wasn't your intention that it should get away, was it? A. No.

Q. Now, how much interest has Josephine Boussard paid on your fifteen thousand dollar notes?

A. Well, through July 10th only, not including the August 10th, and figuring I can add August 10th to it, I have twenty-seven hundred forty-nine dollars, fifty-four cents.

The Court: Give me that again, please.

Mr. Bailey: Twenty-seven hundred forty-nine dollars, fifty-four cents. If August payment was included in that it would be an additional seventy dollars thirty-three cents.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. McNabb): Now, I am sorry to have to ask you to repeat, but I would like those figures, please. How much interest to the bank?

A. You mean Josephine Boussard has given us on this escrow?

Q. That's right.

A. Twenty-seven hundred forty-nine dollars, fifty-four cents, plus—(Interrupted)

Q. Seventy dollars, thirty-three cents?

A. Right. [89]

Q. Twenty-eight hundred nineteen dollars, eighty-seven cents. I believe you stated to me a moment ago that she had paid a total of eleven thousand one hundred thirty-one dollars, four cents as a total figure?

A. That includes the eight per cent interest, the two hundred a month and the six per cent interest on eleven five, yes.

Q. But that does not include the August payment, does it? A. No, it does not.

The Court: What was that. State that again.

Q. (By Mr. McNabb): It does not include the August payment. And the total amount of the August payment was what, Mr. Bailey?

A. Three hundred twenty-seven dollars, eighty-three cents.

Q. Or now then a total of eleven thousand four hundred fifty-nine dollars, eighty-seven cents?

A. I have eleven thousand four fifty-nine, eighty-seven.

Q. We are in accord for a change. How much

(Testimony of Ralph C. Bailey.)

interest has been paid at the rate of fifty-seven dollars fifty cents per month?

A. Including August payment I have eighteen hundred forty dollars.

Q. At fifty-seven fifty? A. That's right.

Q. How did you arrive at that figure?

A. I have taken it from the records of the bank.

Q. How much?

A. Well, my records show here, unless there is an error of some sort, eighteen hundred forty-dollars. My records still only show and that I can prove at this time eighteen hundred forty dollars. If there is a discrepancy why I will have to have time.

Q. Well, Mr. Bailey, let me ask you this now, you have examined the receipt book?

A. Not thoroughly, no.

Q. We are going to, we are going to have to get this matter determined. There have been thirty-four payments of fifty-seven dollars fifty cents made. That is, there have been thirty-four payments made on this escrow, have there not?

A. Well, actually, thirty-two, but they doubled up there at the beginning and that is where I am confused and my take-off could be wrong.

Q. During the lunch hour will you ascertain whether or not that has been done, that is, whether there has not been a total of nineteen hundred fifty-five dollars paid as interest on Mr. Kaye's eleven thousand five hundred, that is thirty-four payments of fifty-seven dollars fifty cents each?

(Testimony of Ralph C. Bailey.)

A. Right.

Q. Now, assuming Mr. Bailey that there has in fact been thirty-four payments of fifty-seven dollars, fifty cents each, thirty-four payments of two hundred each, and thirty-four [91] payments toward the interest on the four notes of the bank, there has been then paid a total of eleven thousand five hundred seventy-four dollars, eighty-seven cents. Is that or is it not a correct statement?

A. The records that I had to work with, I don't come to that figure.

Q. You show eleven thousand four hundred fifty-nine dollars, eighty-seven cents?

A. Yes.

Q. The sum of one hundred fifteen dollars differential there which actually amounts to two interest payments at fifty-seven dollars, fifty cents?

A. That's right.

Q. Mr. Bailey, what has the bank done with the fifty-seven dollars, fifty cents monthly interest payable to Mr. Kaye?

A. I cannot answer that question at this moment.

Q. We started with fifteen thousand dollars indebtedness on the part of Mr. Kaye to the bank. The bank has now received a total of sixty-eight hundred as principal. If that amount only had been applied toward the retirement of the four notes there should not now be an unpaid balance in excess of eighty-two hundred; is that not correct, sir?

(Testimony of Ralph C. Bailey.)

A. If all of it had applied on the notes that is correct.

Q. According to the escrow instructions you were directed to apply those proceeds, were you not? [92]

A. Yes, either directly or indirectly.

Q. And in fact from the date of the contract up to and including the 21st day of July of 1952, a period of ten months, you had done precisely that very thing, had you not?

A. Yes, directly.

Q. No, now, not directly because on the 9th day of July you set up the special account?

A. That's right, up until that time.

Q. But everything prior to the 9th day of July had gone directly? A. That's correct.

Q. That is true. Now, what has become with the rest of the money; the notes presently show an unpaid balance of approximately eleven thousand dollars if I am not mistaken?

A. That's correct.

Q. Where did the money go?

A. In Mr. Kaye's special account which I did not have any jurisdiction over. I took out what I got and that was it.

Q. I have no record aside from the records on the reverse side of the four notes which I take it, now, on the 21st of July of 1952 you applied the sum of eight hundred eighty-eight dollars, nine cents as, by way of principal toward the reduction

(Testimony of Ralph C. Bailey.)

of the balance of your, that is Plaintiff's Identification "I".

The Court: Now wait just a minute. What is that amount? [93]

Mr. McNabb: Eight hundred eighty-eight dollars, nine cents.

Mr. Bailey: And the sum of sixty-nine dollars seventy-three cents toward interest which paid the interest on your Exhibit "I" to date, that is, to 7-21-52; that correct?

Mr. McNabb: Correct.

The Court: Now, let's see, this suit started on the 23rd of April, '52?

Mr. McNabb: Correct.

The Court: Now you are down into July, July 21; is that right?

Mr. McNabb: Yes, your Honor.

The Court: The point we are interested in is it was all paid up to the time they commenced the suit?

Mr. McNabb: No, sir, it is not, your Honor.

The Court: How come?

Mr. McNabb: Because these people have accepted these payments each day, each month in an amount in excess of eleven thousand dollars and I am interested in ascertaining what became of the money clear up to and including the 10th day of August, 1954, sir.

Q. (By Mr. McNabb): Now, there was nothing applied on this particular note from July until

(Testimony of Ralph C. Bailey.)

December; is that not correct, and by this particular note I mean Exhibit "I"?

A. Correct. [94]

Q. And nothing on Exhibit "G" from the 13th of October, '51 until the 11th day of, the 12th day of November, '53? A. That's right.

Q. And on Exhibit "E" there is a gap from October 13, '51 until the 11th day or the 12th day of November, '53? A. That's right.

Q. And the same thing is true of Exhibit "C"?

A. That's correct.

Q. And in each of these months you had received the sum of two hundred a month plus eight per cent on nearly fifteen plus fifty-seven dollars, fifty cents? A. That's correct.

Q. Now, where did that money go?

A. In Mr. Kaye's special account.

Q. Now, do you have the balance of that account, and that was in contravention of the escrow instructions, was it not? A. No.

Q. You were to apply the payments as you received them toward the reduction of these four notes, were you not? A. That is correct.

Q. And you did not do that then?

A. Not directly.

Q. Why did you not do that?

A. We had the funds in Kaye's special account. We could draw on that account as we saw fit. [95]

Q. But did not the escrow instructions direct you to apply those payments? A. Yes.

Q. Well, why did you not do it?

(Testimony of Ralph C. Bailey.)

A. That I cannot answer.

Q. So the interest continued to run on these things all of that period, sometimes months elapsed between the times that you applied the payments?

A. Yes.

Q. Though the money was there and you had been directed to apply it to the payment of these notes? A. That's correct.

Q. Mr. Bailey, I would like to know why from the 9th day of November of 1951, at which time you received a total of six hundred forty dollars, applied it immediately toward these notes; December 10, 1951 you received five hundred thirty dollars and applied it immediately to the notes; March 10th you received three hundred fifty-two dollars and applied it immediately to the notes; April the 8th, 1952 you received three hundred fifty dollars and applied it immediately to the notes; then subsequently you received three payments in May, June and July and applied those payments to the notes and then you allowed months to elapse before you applied any more, though the payments were made. Why did you do that, sir?

A. That I cannot answer. I don't know. I don't remember. I must have had a good reason at the time. [96]

Q. You knew of course that the, you testified yesterday that you knew on the day that this contract was placed in escrow, 691?

A. That's right. The only reason that I could give off-hand is that in view that we were in liti-

(Testimony of Ralph C. Bailey.)

gation that we elected not to take them from this account. That I cannot remember.

Q. Let me say this, Mr. Bailey, on the 9th day of November Mr. Kaye was in default to you on four notes, wasn't he? A. That's right.

Q. On the 9th day of November '51 he was fifteen thousand dollars in debt to you and some of those notes having run since the 8th day of May, 1945, your Exhibit "C"? A. That's right.

Q. Six years old and in default. Now then, five months, November, December, February, March and April you took the money and applied it immediately, a sum of twenty-one hundred seventy dollars worth of funds went directly to the payment of this money without any special account, without any hesitancy on your part or anything of the kind? A. That's right.

Q. Then after you received the money on the 8th day of April you decided to file suit and to foreclose the mortgages which secured these four notes, did you not? A. That's right.

Q. So on the 21st day of April 1952 you filed a [97] mortgage foreclosure action?

A. That's right.

Q. And on the 21st day of July after having held one thousand forty-four dollars fifty-one cents, bam, you immediately applied that to the notes, too, didn't you? A. That's correct.

Q. Now, I am quite interested in ascertaining, Josephine Boussard has paid to the bank on escrow 691 a total of eleven thousand five hundred seventy-

(Testimony of Ralph C. Bailey.)

four dollars and eighty-seven cents, and the bank was directed to use every bit of that money to discharging the four notes which this suit concerns, that is, Plaintiff's Exhibits "G", "E", "C", and "I". I would like to know what became of that money? You were directed to use it toward the liquidation of that indebtedness and it has been in your funds and the escrow instructions provide that you are to take it and for ten months you did precisely as you were directed, and applied it immediately and directly to the payment of these debts. Now, what have you done with the money?

A. I put it in Mr. Kaye's special account. It was his funds, not mine.

Q. Contrary to what you were directed to do then?

A. Well, if I recall correctly, there was some conversation in there that you have not brought out, or are not aware of. If I recall correctly, but that I can't swear to.

Q. But the point is even after you instituted this lawsuit on the 21st day of April '52 you applied three payments [98] and you did that on the 21st day of July? A. That's right.

Q. Did you not? A. That's right.

Q. Without any further instructions or anything of the kind? A. That's right.

Q. Can you provide us with the information as to what has happened to this money. There is a differential?

(Testimony of Ralph C. Bailey.)

A. No, because I didn't spend it all. I put it in an account.

Q. In putting it in an account was contrary to the escrow instructions? A. No.

Q. Supposed to be paid to the liquidation of this debt, was it not?

A. Yes, but this is the means that I took to do it.

Q. But you cannot tell the court why it took you from early in October of '51 to the 9th day of July '52 to decide upon this particular course of conduct, can you? A. No.

Q. And there was no difficulty with finding a place to put the money prior to the time you elected to use a special account, was it?

A. There was no difficulty, no.

Q. And you didn't set up the special account until the [99] 9th of July '52, which was three months after you instituted this very lawsuit, was it not? A. That's right.

Q. And all the times prior to that you had applied the money forthwith immediately and in its entirety? A. That's right.

Q. Now, we have a, you are not able to tell us where the money went then that Josephine Boussard paid in on this contract?

A. Yes, it went to Mr. Kaye's special account and I didn't spend the money out of it. It was not there when I elected to go after it.

Q. On what dates did you elect to go after it?

A. Oh, at various different intervals during the course of this time.

(Testimony of Ralph C. Bailey.)

Q. When?

A. According to these notes there are several different dates and according to the ledger sheets here.

Q. Does the escrow instructions call for setting up of a special account in this thing?

A. It does not. It is the bank's prerogative to do so.

Q. Is it the bank's prerogative also to disregard what it says in escrow instructions?

A. Not if it is used in the right manner, which we feel that this was.

Q. You did then disregard the instructions?

A. No. [100]

Q. What? A. No.

Q. When did you not disregard the instructions?

A. Even by placing to the special account where the funds should have been held at all times and should have been made available to us. We should have been able to go to that account and apply it against the notes at our will.

Q. So that you could have held the entirety of this eleven thousand dollars in a special account, and for all practical purposes we are agreed now that there has been a total of eleven thousand five hundred seventy-four dollars, eighty-seven cents paid, are we not?

A. Well, no, we haven't substantiated that figure yet.

(Testimony of Ralph C. Bailey.)

Q. There is a difference of one hundred fifty dollars, two interest payments?

A. That's correct.

Q. We are then in accord that there has been eleven thousand four hundred fifty-nine dollars, eighty-seven cents paid, are we not?

A. That's right.

Q. And it is your testimony now then that you could have taken that money and in contravention of what it says in any escrow instructions, and have placed that in a special account; is that right?

A. Yes, that is our prerogative.

Q. And let the interest run on the fifteen thousand [101] dollars worth of notes?

A. You got me.

Q. Yeah, that is what I thought. Now, that doesn't add up at all, does it?

A. No, I think you are perfectly right in that particular phase of it, sure.

Q. You don't have any explanation for this special account business, do you, Ralph?

A. The only one that I have is what I told you, George. That we felt like we wanted to keep track of these funds and we wanted to hold them and place them to the notes all at one time. We were in litigation, if you recall, at that particular time, and our mood just exactly was not known and in checking with our attorney it was suggested that we do so.

Q. But even after you set up this special account, Ralph, and had in it those three payments of

(Testimony of Ralph C. Bailey.)

May, June and July, you forthwith applied them on the 21st of July, didn't you?

A. That's right.

Q. And that was after this lawsuit had been started for three months?

A. Well, no. See we had held, actually the account was started July 9th, and we had held the May, June and July payment came in and we started the account at that particular time, after we had filed out suit.

Q. Yeah, three months after you started the suit? [102] A. That's right.

Q. And you had held on July 9th you had very near seven hundred, and on the 21st of July when you applied it you had a thousand forty-four dollars, and the interest had been running on these four notes all the time and Josephine Boussard, who had assumed this obligation, was charged with the interest when she could have saved herself interest on the three hundred in May, three hundred in June, and you say there and held it, didn't you?

A. No, she was not charged.

Q. Who was not charged?

A. Kaye, Kaye would have been charged against his obligation. Josephine Boussard does not enter into this picture at all as far as what you are telling me now.

Q. The interest continued to run on Kaye's debt, did it not?

A. You mean to the Bank of Fairbanks?

Q. Yes, sir? A. Yes, that's right.

(Testimony of Ralph C. Bailey.)

Q. And the money was there with which to pay it? A. That's true. Agreed.

Q. And you didn't apply it? A. No.

Q. And the interest continued to run?

A. That's right.

Q. Why didn't you apply it? You don't know.

A. I don't know.

Q. And you don't know what has become of eleven thousand dollars? A. Yes, I do.

Q. What is the total indebtedness of Kaye to the bank today?

A. Something like eleven thousand dollars.

Q. And it started at fifteen?

A. That's right.

Q. And there has been eleven thousand and five hundred seventy-four dollars paid?

A. Something like that.

Q. And sixty-eight hundred on the principal of this thing? A. That's correct.

Q. Twenty-eight hundred nineteen dollars toward interest to the bank?

A. That's right.

Q. And we have succeeded in reducing the debt of Mr. Kaye by the fantastic figure of about four thousand dollars? A. That's correct.

Q. And you had the money with which to pay it right there, wasn't it?

A. Not in its entirety, no.

Q. How far off would we be?

A. Possibly if we had taken every penny that would have [104] come in to the bank we would

(Testimony of Ralph C. Bailey.)

have been down considerable as we all know at this time.

Q. And you had the authority to take it, did you not? A. Yes.

Q. And you didn't do it? A. No.

Mr. McNabb: That's all.

Redirect Examination

Q. (By Mr. Johnson): Mr. Bailey, in Mr. Kaye's answer which has been filed in this case, Mr. and Mrs. Kaye, that is, they allege that at the time of this contract of purchase and sale was placed in escrow that it was agreed between you and them that the notes and mortgages referred to could be extended and that the plaintiff would accept the monthly payments of two hundred per month together with interest due thereon as payments upon the mortgages and that no further payments would be required. Now, will you tell the court what about that, if anything?

A. You want it in detail?

Mr. McNabb: Well, now, just a minute. I am going to object to it as leading and suggestive. This is Mr. Johnson's witness. This is still the plaintiff's case. Calls for a conclusion. There is no proper foundation laid for it.

The Court: Objection overruled.

Q. (By Mr. Johnson): Will you tell the court whether or not you had any [105] conversation with Mr. or Mrs. Kaye about that proposition?

A. Not at that particular time, no.

(Testimony of Ralph C. Bailey.)

Q. Did you ever have any conversation with them about it, either of them?

A. Well, I don't recall whether I had one directly or not, but indirectly through another person, a third party I did have, yes.

Q. Well, who was that?

Mr. McNabb: Now, I am going to object to that as calling for hearsay testimony.

The Court: All right. Objection sustained.

Q. (By Mr. Johnson): You never had any conversation then directly with Mr. or Mrs. Kaye concerning any agreement as alleged in their answer?

A. Not to my recollection.

Q. Do you know whether or not—(Interrupted)

A. Not at that time. Now we are speaking at that time. I did later.

Q. Well, when was that?

A. I can't remember, several months afterwards.

Q. And who was the conversation held with, both of them or just one?

A. No, just Mr. Kaye.

Q. And where did you talk to him?

A. In the Bank of Fairbanks directors' room.

Q. And will you tell the court what was said?

Mr. McNabb: Now just a moment. I am going to object until you lay a proper foundation.

Q. (By Mr. Johnson): Was there anything said on this alleged agreement on the part of the bank to waive its right to foreclose its mortgages

(Testimony of Ralph C. Bailey.)

at that conversation you say you had with Mr. Kaye?

Mr. McNabb: I am going to object to that question, your Honor, on the grounds that no proper foundation has been laid concerning any conversations between Mr. Bailey and Mr. Kaye.

The Court: Is that pleaded; such an agreement pleaded?

Mr. Johnson: Yes, your Honor, I am reading from Page Two of the Answer of Kaye.

The Court: Which paragraph would that be in?

Mr. Johnson: Paragraph Two of Page Two of my copy.

The Court: This is the answer of defendant's A. L. Kaye and Jean Kaye?

Mr. Johnson: Yes, that is the one I am reading from, and the paragraph *beings,* your Honor, with the words, "that said contract of sale and said escrow instructions were entered into with the full knowledge and consent of the plaintiff" and so on. A little further down, in, let's see, in the fifth line of the paragraph after the words "Josephine Boussard" it reads, "and it was also agreed by and between the [107] plaintiff and the defendants that said notes and mortgages referred to in the four causes of action contained in said plaintiff's complaint would be extended and that the said plaintiff would accept the monthly payments", you see what I mean, of two hundred per month together with the interest thereon as payments upon the mortgages, and that no further payments would

(Testimony of Ralph C. Bailey.)

be required to be made by the said defendants or any of them. Now, it is in relation to that alleged agreement that I am questioning the witness and asking him to tell what, if any, conversations he had with Mr. Kaye about it. He says he had none at the time the agreement was placed in escrow but that subsequently he talked about this matter with Mr. Kaye in the directors' room of the Bank of Fairbanks. At that point counsel interposed his objection.

The Court: Well, as long as you are within the matter pleaded I don't see why it isn't admissible.

Mr. McNabb: Well, Judge, I am not objecting to the admissibility of the testimony at this time, but I am objecting to it on the grounds that he hasn't laid a proper foundation for the question that he asked this man, and I would like to have a proper foundation laid for it to know where and when the conversation took place and who was present and all of the other things that normally and naturally constitute a proper foundation.

Mr. Johnson: The witness testified, your Honor, that he could not recall when it took place, it was several months [108] afterward. He did say it took place in the directors' room of the Bank of Fairbanks, and at that point counsel interposed the objection. I had not yet had an opportunity to ask the witness who was present. I intended to do so.

Mr. McNabb: Proceed.

The Court: Well, with that understanding we will overrule the objection.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): Who was present when you had this conversation with Mr. Kaye aside from Mr. Kaye and yourself, if anyone?

A. I think we were alone for a little bit, and then I think Mr. Johnson then president of the bank, appeared on the scene. If I recall correctly. If there were any others around I do not recall.

Q. Do you recall what Mr. Kaye said about this matter as alleged in his answer, and what you said?

Mr. McNabb: Now just a minute. Go ahead.

Q. (By Mr. Johnson): Do you recall what, if anything, was said about the matters set forth in paragraph Two of Mr. Kaye's answer concerning an alleged agreement to extend this mortgage?

Mr. McNabb: Your Honor, I am going to object now on the grounds that no proper foundation is laid for it, and by that I mean I think that we should make some further effort to ascertain the approximate date of this conversation. He said several months later. The witness may be able to establish [109] by one method or another the approximate date, certainly at least the month in which this conversation took place.

The Court: Objection overruled.

Q. (By Mr. Johnson): Go ahead now. Will you tell what Mr. Kaye said, as nearly as you can remember, and what you said?

A. Well, these are not the exact words because I can't recall what was said either by Mr. Kaye or myself, but the gist of the conversation was that we had called in Mr. Kaye to let him know that

(Testimony of Ralph C. Bailey.)

we were not satisfied with the liquidation of this loan we speak of in the amount of funds being received on the escrow. At that time it was Mr. Kaye's firm conviction that we had given a verbal commitment to the realtor of this third person we speak of that, who in turn had told Mr. Kaye that we would liquidate the mortgage in a satisfactory manner from the proceeds of this escrow. That was not the case at all and it was a misunderstanding, and at that time is when we told Mr. Kaye that we wanted to liquidate the mortgage loan as soon or sooner than he had elected to do so by giving us this escrow.

Q. At the time that you received this escrow, did you enter into any agreement with Mr. Kaye and Mrs. Kaye, or with Miss Boussard?

A. I did not.

Q. Concerning the change in the method of liquidation of your notes and mortgages? [110]

A. I did not.

Q. Did the Bank of Fairbanks?

A. They did not.

The Court: It is just twelve o'clock, Mr. Johnson. This is a good place to stop for recess. Do you, do we have anything on?

Clerk of Court: No, we do not, your Honor.

The Court: We will recess until two o'clock.

Clerk of Court: Court is recessed until two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Counsel ready to proceed with the trial of Bank of Fairbanks vs. Kaye?

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well.

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further redirect examination.

The Court: You are cross examining this witness, are you not?

Mr. Johnson: No, I was examining him further on redirect, your Honor. [111]

Q. (By Mr. Johnson): Mr. Bailey, the agreement which has been admitted in evidence as Defendant's Exhibit "2" which is the contract of purchase and sale between A. L. Kaye and Jean Kaye as sellers and Josephine Boussard as the buyer, did you or any one for the bank have anything to do with the preparation of this agreement?

A. No.

Mr. McNabb: Now, just a minute. I am going to object to that as being too vague and having no bearing on the issues of this case.

The Court: Objection overruled.

Q. (By Mr. Johnson): Did the Bank of Fairbanks take part in any discussions between Jose-

(Testimony of Ralph C. Bailey.)

phine Boussard and the Kaye's that led up to this agreement.

Mr. McNabb: Just a minute. I am going to object, no proper foundation having been laid for it, and calls for something beyond the knowledge of this defendant, or this witness.

The Court: Objection overruled.

Q. (By Mr. Johnson): So far as you know, do you know whether or not—(Interrupted)

A. No, we had nothing to do with it to my knowledge.

Mr. McNabb: I move that that answer be stricken [112] on the grounds that it was not responsive to the question.

The Court: Motion denied.

Q. (By Mr. Johnson): After the agreement was executed it was brought to you together with a letter of instructions, or the escrow instructions, is that correct, and deposited in your bank?

A. That's correct.

Q. In the usual course of your business?

A. It was.

Q. You have many such escrows in your institution, do you not? A. We do.

Q. Now, referring to the answer filed by Josephine Boussard and specifically to Paragraph Five of the first affirmative defense which appears—(Interrupted)

Mr. McNabb: May the court please, I would like to call to Mr. Johnson's, to the court's attention that we are still in the plaintiff's case and that this

(Testimony of Ralph C. Bailey.)

witness is the plaintiff's witness, this being redirect examination, and I am going to object to him asking leading and suggestive questions.

The Court: Very well.

Mr. Johnson: Well, if the court please, I hadn't even finished the question, and certainly counsel in his cross examination brought up all that there was to bring up about the Boussard, Kaye contract. It would seem to me that Boussard being a defendant in this case, I have the right to ask the [113] witness a specific question concerning the answers.

The Court: You are attorney for the plaintiff, aren't you?

Mr. Johnson: That is correct, sir.

The Court: You called him as your witness?

Mr. Johnson: Yes.

The Court: Then you can't ask him leading questions unless special permission is granted.

Mr. Johnson: I was simply by way of preliminary reference, your Honor, leading up to a question I wanted to ask him specifically and I was trying to do it by reference in a paragraph filed in the answer by the defendant Josephine Boussard. I hadn't even gotten any farther than that. I hadn't even asked the question.

The Court: I take it all Mr. McNabb is telling you, he was just telling you what he was going to do and he has objected. That is how the question arose.

Mr. Johnson: May I proceed and if I am wrong the objection may——

(Testimony of Ralph C. Bailey.)

The Court: Yes.

Mr. Johnson: Will the court refer to the answer of Josephine Boussard which was filed in this case, and on Page, Pages 2 and 3, Paragraph five of the first affirmative defense, I should like to ask this witness a question with reference to an allegation made in that paragraph.

The Court: Did you want to show him the original pleading? [114]

Mr. Johnson: No, I can just read it. I thought the court might want to follow it.

Mr. McNabb: That is precisely what I am objecting to, your Honor, reading the pleadings to this witness, saying is that true or is that false. That is a leading question, Judge.

The Court: Under these conditions I will regard that as admissible.

Mr. McNabb: Very well, sir.

Q. (By Mr. Johnson): Now, in paragraph five, which appears on Pages 2 and 3 of Josephine Boussard's answer she alleges that the plaintiff made representations to her and to her agent that the plaintiff would accept payments to discharge mortgages set out in the plaintiff's complaint according to the terms and the manner as set out in Exhibit "1". Now, Exhibit "L" in this answer is the contract which you have before you there and that she proceeded in good faith to sign said contract and thereafter made the payments to the plaintiff as aforementioned. Did you ever have a conversation with Josephine Boussard prior to the

(Testimony of Ralph C. Bailey.)

signing of this agreement relative to that allegation or anything like it? A. No.

Mr. McNabb: For the purpose of record, I am going to object to the question as being leading and suggestive and not proper recross examination, or redirect examination. [115]

The Court: Objection overruled.

Q. (By Mr. Johnson): What was your answer?

A. No.

Q. After the agreement which you have before you which is the contract of purchase and sale, after that agreement was executed and placed in escrow, were you or were your bank, did you have any conversations with Josephine Boussard or any agent of hers relative to this matter?

Mr. McNabb: Same objection, your Honor.

The Court: Overruled.

Mr. Bailey: No. If you are asking me if, that I agreed or talked to Josephine in regards to accepting this contract for the liquidation of the notes, mortgage notes alone, I did not agree to the terms and the conditions.

Q. (By Mr. Johnson): Now, Mr. McNabb has questioned you considerably about the payments made on the Boussard contract as being, and which payments have been applied or some of them at least have been applied on Kaye's indebtedness. Mr. McNabb has kept insisting that this money was Miss Boussard's money.

Mr. McNabb: Now, I object to counsel testify-

(Testimony of Ralph C. Bailey.)

ing as to what I have been insisting on. I haven't even been a witness here.

Mr. Johnson: Well, I think that is a fair interpretation of this line of questioning. [116]

The Court: Finish your question and I will rule on it.

Q. (By Mr. Johnson): Isn't it a fact that all of the money that Miss Boussard paid on her contract which you have there before you actually belonged to Mr. Kaye under the terms of the contract?

Mr. McNabb: I object to that as calling for a conclusion, not within the issues of this case, improper redirect examination, no proper foundation has been laid for it.

The Court: Objection sustained.

Q. (By Mr. Johnson): In addition to the payments which were provided in this contract to be made or turned over to the bank after October 9, 1951, and up until the time that the bank started its foreclosure proceeding in April, did Mr. Kaye make any further payments on the notes and indebtedness which he owed to the bank as provided by those notes?

A. Over and above this contract?

Q. Yes. A. No.

Q. Did the Bank of Fairbanks either before or after October 9, 1951 ever enter into any written agreement with Mr. and Mrs. Kaye or Mrs. Boussard wherein it agreed to change the terms of payment of the indebtedness that was due the bank by

(Testimony of Ralph C. Bailey.)

Mr. and Mrs. Kaye? A. No. [117]

Q. This special account that you speak of which you term as a special account, do you have the ledger sheet of that account? A. I do.

Q. Does that show all of the deposits and withdrawals made to the account? A. Yes.

Q. From the time that it was set up?

A. Yes.

Q. Did Mr. Kaye have the right to draw on that account? A. Yes.

Q. Did he from time to time make withdrawals on the account? A. Yes.

Q. After you started your foreclosure suit, did you have occasion to add to the indebtedness due by Mr. Kaye?

Mr. McNabb: Now, I object to that.

Q. (By Mr. Johnson): By way of attorneys fees and court costs?

Mr. McNabb: I object to that as having no bearing on the issues of this case, your Honor.

The Court: Objection sustained.

Q. (By Mr. Johnson): This morning you testified, I believe, in answer to Mr. McNabb's question that so far as you were able to determine there had been paid in on the Boussard account or the Boussard [118] escrow up to and including August 10, 1954, the sum of eleven thousand four hundred fifty-nine dollars, eighty-seven cents; is that correct? A. That's correct.

Q. And of that amount how much was credited to or applied on the Kaye indebtedness?

(Testimony of Ralph C. Bailey.)

A. Principal and interest in the amount of six thousand nine hundred eighty-two dollars, eight cents.

Q. The balance of that sum of money went where, if you know?

A. Bank account four thousand one hundred twenty-four dollars, seventy-one cents. Five dollars for service charges, and this August 10th payment was applied to the notes which would increase my original amount of sixty-nine hundred by three hundred twenty-seven dollars, eighty-three cents.

Mr. McNabb: How much then has been applied on the note?

Mr. Bailey: Six thousand nine hundred eighty-two dollars, eight cents, plus three hundred twenty-seven dollars. eighty-three cents.

Q. (By Mr. Johnson): Do you have those figures written down so that they could be presented to the court?

A. They are, well, they are on adding machine tape.

Clerk of Court: Plaintiff's Identification No. 10.

(Adding Machine Tape Memo was marked Plaintiff's Identification No. 10.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 10, ask you if that is a memorandum made up by you? A. It is.

Q. Does it show the total amount of principal and interest paid or credited to the notes?

A. No, not this particular slip does not.

(Testimony of Ralph C. Bailey.)

Q. Does it show the amount that was paid or credited to the bank account?

A. It does. It shows the deposits.

Q. Well, isn't there a pencil figure below that which shows the principal and interest paid on the notes?

A. Yes, six thousand nine hundred eighty-two dollars, eight cents, plus three hundred twenty-seven dollars, eighty-three cents.

Q. Does it show this five dollar deduction for the escrow charges? A. It does.

Q. And does it show the August 10th payment?

A. It does.

Q. So that it does show the total of principal and interest paid in on the Boussard account?

A. Yes.

Q. And the distribution of the money? [120]

A. Yes.

Q. Is it true and correct so far as you know?

A. Correct as far as I know.

Mr. Johnson: We would like to offer Plaintiff's Identification No. 10.

Mr. McNabb: I am going to object to it. It doesn't show anything except a tape full of figures, your Honor. Nothing designated on this identification.

The Court: I am going to sustain that objection, Mr. Johnson, because it doesn't designate what it stands for. It could be made plainer, more lasting than it is. This depends upon the memory as

(Testimony of Ralph C. Bailey.)

to which column means which, without any designation in writing.

Q. (By Mr. Johnson): Do you have a memorandum that you have made up which segregates the payments, shows how they were credited and to whom and for what?

A. I have work sheets which is a break down of the receipts and a break down of the disbursements.

Q. Was that made up by you? A. It was.

Q. Is it in your handwriting? A. It is.

Q. Would that contain the information that was on this adding machine tape that we just mentioned?

A. It would as far as the receipts is concerned. I [121] believe I would have to add to the disbursements to complete it.

Q. That is because of some additional changes?

A. That's right, August 10 payment.

Q. Could you make those additions and then we could submit it after while? A. I could.

The Court: Do you have a pad there of some sort?

Mr. Bailey: Yes, I have. I have my work sheets, your Honor.

The Court: Well, I would like to get a condensed matter to look at so it wouldn't take so much time.

Mr. Bailey: I have too many figures, and I am possibly the only one that could read it.

Mr. Johnson: We will prepare such a condensed statement, your Honor.

(Testimony of Ralph C. Bailey.)

The Court: Don't get too much on it. Just the essentials.

Mr. Johnson: Just the essentials, yes.

The Court: Write what it stands for.

Mr. Johnson: Well, subject to the right, your Honor, to submit this condensed statement, I have no further questions.

The Court: Very well.

Recross Examination

Q. (By Mr. McNabb): Mr. Bailey, do you know in which two months Josephine [122] Boussard did not pay interest to Mr. Kaye in the amount of fifty-seven dollars, fifty cents a month?

A. Time did not permit me to break that down, but I am sure, fairly sure that I am correct. I know where it is but I would hesitate to answer your question until I verified it down to my satisfaction.

Q. Let me ask you then, did she ever fail during the course of this contract to pay fifty-seven dollars, fifty cents, to the best of your knowledge?

A. To get to that answer it is evidenced by my records. The person or persons accepting the first two payments on this escrow somewhere along the line failed to prepare the fifty-seven dollar, fifty cent entry in the proper places. I think it has been entered, but it has been entered in the improper column. It shows interest income to the Bank of Fairbanks, and it is my belief at this time without checking it out further that possibly one hundred

(Testimony of Ralph C. Bailey.)

fifteen dollars should have been credited to Kaye on his portion as interest on the eleven thousand five hundred.

Q. You mean that was way back along early in the first couple of payments?

A. That is correct.

Q. And you got the entirety of those first payments? A. That is correct.

Q. But you believe now Josephine Boussard in each of these thirty-four payments did in fact pay fifty-seven dollars [123] fifty cents?

A. No, that is not correct. In fact according to these records here and checking it this noon it is evident here her interest to Kaye didn't start until December 9, and that from the time the contract of sale was signed until December 9th, fifty-seven dollars, fifty cents in both instances Kaye did not receive. However, it is my feeling at this time that person or persons receiving the payments on the Bank of Fairbanks as you call the portion of this deal, fifteen thousand dollars, there was too much interest taken and there is a differential in there so the fifty-seven dollars fifty cents could be in what we collected presumably to be in our portion, on the one portion of the obligations.

Q. Now then, there is no dispute at all among any of the parties, is there, that there was no special account into which in which the payments of Josephine Boussard were deposited prior to the 9th day of July, 1952?

A. There could be. I would want to go back and

(Testimony of Ralph C. Bailey.)

check my records further back, myself individually I have had some one else do it this far.

Q. Well, now, you testified yesterday and again today that on the 9th of July you established a special account?

A. That's right. He could have had a special account before that.

Q. Well, how many special accounts did he have then?

A. Well, how do I know without checking?

Q. What special account were you talking about all of this time?

A. The one established on July 9th.

Q. How many special accounts did Mr. Kaye have on the 10th of July then?

A. One to our knowledge.

Q. How many did he have on the 8th of July?

A. One to our knowledge at this time.

Q. When did he establish the one that he had on the 8th of July?

A. I beg your pardon. I misunderstood.

Q. So far as you know he had no special account at all on the 8th of July?

A. Not to my knowledge.

Q. All right. Let me ask you again, what was done with the money that was taken in by the bank on the first of November 1951 until you established the special account on the 9th day of July '52?

A. The proceeds either went on the note or when we opened up the special account they went in there.

(Testimony of Ralph C. Bailey.)

Q. So there was no special account in which they were deposited? A. No.

Q. You applied those payments directly, did yon not? A. Yes.

Q. So there wasn't any special account in which you [125] deposited them at all prior to the 9th of July?

A. No, not for this particular purpose. As I say, he could have had another one in his own name and used it for other things.

Q. You told me this morning though, did you not, that you established this special account for the purpose of keeping an accurate account of the transactions as they occurred?

A. That's right.

Q. You did that on the 9th?

A. That's right.

Q. Which leads us in turn to believe that there was no special account into which they were deposited prior to that time?

A. That's correct.

Q. So you in effect took the money and immediately applied it, did you not?

A. Up until July 9th, or up until the payments received in May.

Q. And that amounted to two thousand one hundred seventy dollars, eighty-four cents, actually it is two thousand one hundred seventy-seven dollars, eighty-four cents?

A. Well, that, you have it broken down and I haven't broken it down.

(Testimony of Ralph C. Bailey.)

Q. Well, yesterday you testified that it was approximately two thousand one hundred seventy dollars? A. That would be right. [126]

Q. And so that was applied forthwith?

A. Yes.

Q. Now at whose request was this, or how did, what conversations or what transactions led up to the establishment of this special account on the 9th of July? A. I don't remember.

Q. Well, did you consult with Mr. Kaye about it?

A. I have a feeling that we talked about it, but I cannot, I can't say yes and I can't say no, because I don't recall.

Q. Did you ever deliver to Mr. Kaye any memorandums or any notations or anything of the kind on the 9th day of November of 1951 or the 10th day of December, 1951, or February 11, '52, or the 10th or 12th of March, '52, indicating to him that you had applied the proceeds of the payments to the liquidation of his indebtedness?

A. Myself personally, no.

Q. Do you know whether the bank did or not?

A. No, not offhand.

Q. By what authority did you take the proceeds of those payments and apply them on that indebtedness?

A. According to the contract of sale.

Q. And that was your authority, the escrow instructions in that contract? A. Yes.

Q. What? [127] A. Yes.

Q. That is the only authority that you had, was

(Testimony of Ralph C. Bailey.)

it not? A. In writing, yes.

Q. You had authority that wasn't in writing?

A. I don't recall that.

Q. Then why were you so specific in saying that was the only—(Interrupted)

A. I wanted to point out the issue, that we could have had conversations that I don't remember anything about.

Q. You sure now that you didn't have any conversations? A. No, I am not sure.

Q. Then the special account of July 9th was set up entirely for your benefit, or the bank's benefit, shall be say? A. That's right.

Q. And prior to that time by virtue of the authority vested in the escrow department of your bank under the terms of the escrow instructions here you had applied the proceeds of payments of this contract as they were received?

A. Yes.

Q. And then you established on the 9th day of July a special account; who had the authority to draw checks on that special account?

A. Mr. Kaye, and we used it as a debit memo form.

Q. What, you have no, you have no present recollection of any conversation that you had with Mr. Kaye at that time?

A. Well, I think we had some, but I can't bear it out, [128] and I can't prove it, so—(Interrupted)

Q. Now, do you now after this length of time have any recollection of why you did not take the

(Testimony of Ralph C. Bailey.)

entirety of the one thousand forty-four dollars, fifty-one cents that was in the special account on the 21st day of July; you set up that now for your own use and benefit, why didn't you take all of it?

A. I still do not recall, George. Possibly I didn't make the entry myself.

Q. You, actually if you set this account up, Ralph, for the purpose of keeping clear and concise records as to the distribution of the proceeds of this account, why did you allow Mr. Kaye to write checks against it?

A. There is another reason in there that I do not remember.

Q. There must have been. Mr. Bailey, what was the outstanding balance of the indebetedness due from Mr. Kaye to the Bank of Fairbanks on the 9th day of April, 1952?

Mr. Johnson: If the court please, I fail to see that that has any bearing upon the issues in this case. It is not proper cross examination. The suit was started on April 23rd, 1953, or '52, and at that time the allegations were made in the complaint as to the outstanding indebtedness. Since that time the notes have been introduced and they are the evidence of what was due and owing and what was due and owing April 9th has no bearing on this case at all so far as I can see. [129]

The Court: Objection sustained.

Mr. McNabb: Your Honor, I propose by that question to show that between the 10th day of May, after the 8th day of April, Judge, of 1952, though

(Testimony of Ralph C. Bailey.)

the bank had in its possession a total of one thousand and forty-four dollars, fifty-one cents which it could have then applied against this debt to stop the interest from running on that amount of money, they chose to hold it in some place which we have yet to ascertain and did not apply it as the proceeds were received, and the interest continued to run until the 21st day of July, 1952. That matter, if nothing else, when they had previous to that time immediately applied the proceeds of each payment and did in this instance subsequently apply those proceeds, then the interest should not have been allowed to run on that fifteen thousand or fifteen thousand dollars less the sum of two thousand one hundred seventy-seven dollars, your Honor; and I would like to know why they didn't apply these proceeds to stop that interest from running, sir.

Mr. Johnson: Well, if the court please, that is not a fair statement of the record. In the first place, there was no money held by the bank in April. In April they only had the one payment which was applied. Then on April 23rd they commenced their suit to foreclose based on the fact that all of the notes were then in default and had been for a long time. The matter that counsel is now referring to is something that has arisen after the suit was started and refers to the payments [130] that were made in May, June and July. They were held for a time in the special account and subsequently were withdrawn and paid. However, that special account, as the testimony shows, was Mr. Kaye's

(Testimony of Ralph C. Bailey.)

and he had the use of it at the same time. It doesn't make any difference to the issues in this case at all because the issues as defined by the pleadings are whether or not there was a valid agreement on the bank to waive its foreclosure rights. That is the issue here.

Mr. McNabb: First there must be a money judgment, your Honor. First there must be a money judgment and if the bank had this, was holding these funds in a special account and allowing the interest to run and I would like to point out to the court that the money was not held in a special account until the 9th day of July because by Mr. Bailey's testimony no such account was established and so they must have been kept in the vault or some similar place and they could have applied it immediately as they did each of the previous five payments.

The Court: Well, I think you should start with the date that you started your suit and if you want to show the conditions then thereafter why no doubt it would be admissible but as it is now, there is nothing to warrant starting back on the 9th of April.

Mr. McNabb: Well, Judge, that is the day from which the interest would have run on that balance and that is the only reason for starting there, sir, as of the 9th day of April and the interest continued to run on that particular balance. It ran from the 9th of April until the 21st day of [131]

(Testimony of Ralph C. Bailey.)

July, sir, at which time they applied eight hundred eighty-nine dollars.

The Court: Well, if that is a correct statement I can see a reason. I will overrule the objections to it.

Q. (By Mr. McNabb): Do you know now what the balance was due and owing as of the 9th day of April 1952?

A. Not offhand, but I will figure it here.

The Court: We will take a recess for 10 minutes.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 2:45 p.m., the court took a recess until 3:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Are you ready to proceed?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

RALPH C. BAILEY

the witness under examination at the time the recess was taken, resumed the stand for further recross examination.

Q. (By Mr. McNabb): In response to my last question, now, Mr. Bailey, there was what amount due on the indebtedness of Mr. Kaye on the 9th day of April, 1952?

A. My records show and indicate twelve thousand eighty-eight dollars, eighty-nine cents principal.

Q. And the bank did receive on the 10th day of

(Testimony of Ralph C. Bailey.)

May the [132] sum of three hundred forty-nine dollars, fifty cents by reason of this contract, escrow 691, did it not? A. Yes.

Q. And that amount of money was received on May 10th and not applied until July 21?

A. That's right.

Q. And the bank did receive the sum of three hundred forty-eight dollars, seventeen cents on June 5, '52 and that amount of money was not applied until July 21, '52?

A. That's right.

Q. And on July 11th the bank received three hundred forty-six dollars, eighty-four cents and that amount not applied until July 21, 1952?

A. That's right.

Q. At which time, Mr. Bailey, the bank did apply eight hundred eighty-eight dollars, nine cents as against the principal of the Plaintiff's Exhibit "I" and sixty-nine dollars, seventy-three cents interest; is that correct? A. That's correct.

Q. Now then, had you applied those sums as you received them interest would not have been due on that obligation in the amount of sixty-nine dollars, seventy-three cents over that period, would it? A. No.

Q. So the sixty-nine dollar, seventy-three cent figure as far as interest is concerned is incorrect, is it not? [133] A. That's right.

Q. Now, during the course of the subsequent payments and I believe you testified that your records indicate that Josephine Boussard has made

(Testimony of Ralph C. Bailey.)

each of her payments according to the tenor of this contract of purchase and sale which is in evidence here? A. That's right.

Q. Those payments were not applied toward the satisfaction of these debts as they were made, as the payments were made, were they?

A. No. Part of them went there and then as I have stipulated in my testimony before why they went to this special account.

Q. Well, even according to the escrow instructions which you of course were in possession of and those escrow instructions provide that the payments should be applied toward the reduction of this mortgage indebtedness of Mr. Kaye, that was not done was it, as the payments were received?

A. No.

Q. And consequently, the interest as it has accrued throughout the period from the 8th day of April, 1952, is incorrect so far as your instructions and the receipt of the money was concerned?

A. Admittedly, yes.

Q. Prior to the execution of the contract, did you have any discussions with anyone concerning the sale of this property? [134] A. I did.

Q. With whom did you have those discussions, or that discussion? A. Mr. Lazar Dworkin.

Q. Where did those discussions take place?

A. In the Bank of Fairbanks.

Q. How many such discussions did you have?

A. Two that I recall.

Q. Do you recall when they were?

(Testimony of Ralph C. Bailey.)

A. Just previous to the consummation of this sale of the piece of property.

Q. What was the nature of those discussions?

A. He had asked if we would settle for funds received on this proposed escrow at that time to liquidate the mortgages and I told him that we would not settle for that. We felt like we wanted more money to liquidate the indebtedness at an early date.

Q. Did he advise you that there was an opportunity or that he had an opportunity to sell the property? A. He did.

Q. Did he tell you to whom he had the opportunity to sell it? A. He did.

Q. Did you have any discussions with him at that, or any subsequent time concerning the ability of the proposed purchaser to pay? [135]

A. I do not recall that.

Q. Did you have any discussion with him concerning the credit standing or the credit rating of the proposed purchaser?

A. I don't remember that.

Q. Did you, did he name the proposed purchaser to you? A. Oh, yes.

Q. And what was the name of the purchaser?

A. Josephine Boussard.

Q. And she did subsequently, of course, acquire the interest of Mr. Kaye in the property, or execute with him a contract of sale for the property, did she not? A. She did.

Q. Her subsequent conduct in making the pay-

(Testimony of Ralph C. Bailey.)

ments that she had been and was at that time an excellent credit risk, is that not true?

A. That is correct.

Q. And you knew that to be true at the time that she made the payments?

A. I felt that way about it, yes.

Q. Did you at any time discuss with Mr. Dworkin the preparation of this particular contract of sale?

A. No, I had no interest in it. It is not my duty to get it prepared.

Q. No, I realize that, Ralph, but I want to know if you did in fact, do you now have any recollection of having ever talked with Mr. Dworkin concerning the preparation of the actual instrument? [136]

Mr. Johnson: If the court please, I am going to object now on the ground that the proper foundation hasn't been laid because so far as I can determine up until now, Dworkin's status in this business is completely unknown. I don't know if he was representing Kaye's or Boussard, or who, and I think that ought to be established because otherwise it would be immaterial and certainly not proper cross examination.

The Court: Objection overruled.

Q. (By Mr. McNabb): Do you have any present recollection of whether you did talk with Mr. Dworkin concerning the preparation of the contract?

A. We could have. I couldn't say yes or no. I don't remember that part of it. It is hard to remember two and a half years ago.

(Testimony of Ralph C. Bailey.)

Q. Do you have any recollection at this time as to whether you discussed with him the attorney who was to prepare the contract?

A. No, I don't remember that.

Q. Do you have any recollection of having called any attorney and given, relayed to any attorney the present unpaid balance of the indebtedness of Mr. Kaye to the bank?

A. That could have been, but I don't remember.

Q. You could have done that?

A. I could have done it, sure.

Q. But you just do not know, have any definite recollection; is that it? [137] A. No.

Q. Did you, let me ask you this, Ralph, has the bank ever since the 9th day of November received two hundred dollars a month and the interest on the unpaid balance of the four notes as they were reduced by the previous payment?

A. Will you restate that?

Q. Has the bank, has the Bank of Fairbanks, the plaintiff here, received the sum of two hundred dollars per month since the 9th day of November 1951, plus eight per cent interest on the then unpaid balance of the four notes?

A. No, the bank has not received it all, no.

Q. The bank has not received it?

A. We have taken it in over our counter, but as far as being applied against the indebtedness of Kaye, the mortgage notes, no. It has not all gone to that one particular place.

(Testimony of Ralph C. Bailey.)

Q. First, however, all of those payments have been made, have they not?

A. The payments, that—(Interrupted)

Q. By Josephine Boussard?

Mr. Johnson: If the court please, it seems to me this is entirely repetitious. He has been over it a hundred times.

The Court: It seems to be necessary. Overruled.

Mr. Bailey: You are asking me if all the moneys that I have received from Josephine Boussard to be applied against the escrow has gone to the indebtedness of Mr. Kaye? [138]

Q. (By Mr. McNabb): Well, you have already answered that in the negative, have you not?

A. That's right.

Q. Now, then, my next question was, have not each of the two hundred dollar installments as provided by the contract been made?

A. By the contract, right. They have been made.

Q. And in addition to the two hundred dollar installments paid when due, the purchaser paid eight per cent interest on the then unpaid balance of those four notes, is that not correct?

A. No, it is not set up that way. She has paid eight per cent interest on fifteen thousand, which is provided for by the escrow.

Q. And the fifteen thousand is the total of four notes as they existed when the contract was written? A. That's correct.

Q. And the contract was written for the pur-

(Testimony of Ralph C. Bailey.)

pose of requiring this purchaser to make payments on those four notes, was it not?

A. Yes, according to the contract.

Q. Now then, as she made her payments, the fifteen thousand indebtedness should have been reduced. She has paid interest on fifteen thousand at the rate of eight per cent per annum, has she not?

A. That is right according to the contract. [139]

Q. All right, she paid them right down the line each and every one of them?

A. That's right.

Q. And the escrow instructions along with this contract instructed the bank to apply those payments to the reduction of the mortgage indebtedness for which this action is instituted?

A. That's right.

Q. And from the first date of any, that any such payments was made and that was on the 9th day of November, 1951, you applied immediately and forthwith without any hesitancy without any delay, without running through any additional bank account the payments for November, December, February March and April, did you not?

A. That's correct.

Q. And there was no special account at all?

A. No.

Q. And then you established a special account having held the May, June payments you then established a special account, did you not?

A. That's right.

Q. And the special account was established on

(Testimony of Ralph C. Bailey.)

the 9th day July? A. That's right.

Q. And on the 11th day of July you received an additional three hundred forty-six dollars? [140]

A. That's correct.

Q. And that amount of money, the accumulation of those four payments was in the amount of one thousand forty-four dollars, fifty-one cents, and on the 21st day of July you applied eight hundred eighty-eight dollars, and nine cents to the principal of the mortgage indebtedness, did you not?

A. That's right.

Q. How was that particular transaction handled, Ralph?

A. You mean the, whereabouts in the bank and who did it.

Q. No, sir. I mean what mechanical transactions took place transferring from the special account the eighty, the eight hundred eighty-eight dollars, nine cents?

A. It is what we bankers term as a credit memo to an individual's account.

Q. That was a debit memo to Mr. Kaye's special account? A. Special account.

Q. You established that for the particular purpose of ease in banking procedures and so that you might have a record?

A. I might have inferred that, but not necessarily, particularly, I mean. I think it was set up for some other funds that he had coming in from other sources at the time also. We used that particular account. Now, I believe it would become

(Testimony of Ralph C. Bailey.)

necessary for Mr. Kaye to help establish that ac count since his name was on the signature card o that account and therefore, Mr. Kaye was aware

Q. Well, let me ask you this, Ralph, in view o your [141] previous conduct, that is when I say your I mean the bank's, in view of your previous conduct during the periods of November, Decem ber, February, March and April, it was not neces sary that such an account be established, was it with which to facilitate the bookkeeping and the banking procedures to see that this money was in fact applied against Mr. Kaye's indebtedness to you?

A. That would be a matter of argument, and the difference of two people. One person might elect to do it this way, another person might elect to do it another way.

Q. I say, though, it wasn't necessary, was it?

A. In my opinion at that time evidently it was necessary.

Q. But your opinion in the five preceding months was different, was it not?

A. Evidently so. That is why, because we did apply it direct.

Q. Mr. Bailey, when you made the, when you made the funds which you received from Josephine Boussard available to Mr. Kaye to do with as he saw fit and that is what you did, when you estab lished this special account, was it not?

A. It wasn't meant that way.

(Testimony of Ralph C. Bailey.)

Q. I am not interested in what was meant. I am interested in what occurred?

A. What occurred it was put in the bank account and withdrawn by someone else other than ourselves.

Q. There is no question according to the instructions on [142] that contract of purchase and sale that you were to apply those payments toward the indebtedness? A. That's right.

Q. And regardless of your previous conduct in the matter you allowed these payments to be deposited in a special account upon which Mr. Kaye could write checks, did you not? A. Yes.

Q. And so then, if the bank did not receive the payments as according to the, two hundred according to the contract and interest according to the contract, the payments that Josephine Boussard made each and every month in strict compliance with that contract, it was through no fault of Josephine Boussard that you didn't get it, was it?

A. No.

Q. And so you made available these funds for Mr. Kaye to write checks on and so on?

A. No, I didn't.

Q. Who did that?

A. Evidently he took them out of his account, which he was allowed to draw on.

Q. Who put them into the account, Mr. Bailey?

A. I did that. I put them into the account.

Q. So it was the bank's fault if it didn't get the

(Testimony of Ralph C. Bailey.)

two hundred a month and interest and not Josephine Boussard's?

A. No, it is not set up that way, George. I am sorry.

Q. Well, everybody ought to be sorry about this thing, [143] but that is what happened though, wasn't it?

A. That is what happened. Someone else got the funds and we all know who got the funds.

Q. And the money was paid in and escrow instructions provided for the bank to accept it and take it and apply it to the debt?

A. That is admitted.

Q. And there wasn't anything about setting it up in a special account, and you allowed months to elapse before you took any money out of that account? A. I understand.

Q. You did that, didn't you?

A. Yes, that's right.

Q. And then consequently it was nobody's fault but yours, and I use the pronoun as meaning the Bank of Fairbanks, if you didn't get two hundred a month and interest; isn't that correct?

A. No.

Q. Whose fault is it?

A. I feel like those funds were put in that special account for a special purpose.

Q. Ralph, you feel like it but I want to know what the truth of the matter is?

A. The truth of the matter, George, we know the truth. Let's get down to basic facts. We know

(Testimony of Ralph C. Bailey.)

why they were put in the account. We know we should have taken them right away. I [144] am wrong, admittedly. We should have taken them at each time. They were put in this account and went to that account to withdraw those funds to liquidate the note. They should have been there and they weren't.

Q. You didn't even go to the account the day the money was deposited?

A. That is admitted.

Q. And by the same token you had no authority to put it in a special account?

A. No, I don't agree with that.

Q. Does it say anything in the escrow instructions concerning a special account? A. No.

Q. It just says she will pay two hundred a month and interest in the bank?

A. I think that is within the prerogative of the bank to put it in a special account and withdraw it from the bank.

Q. Ralph, you didn't elect to do it January, February, March or April?

A. That's right, I know I didn't.

Q. As far as the indebtedness to the bank of Josephine Boussard, the bank has done very little right, has it?

A. That I don't agree with you.

Q. Mr. Bailey, it says in the escrow instructions you are instructed further that from the outset and I think that meant forthwith, from the outset payments of two hundred plus [145] interest accrued

(Testimony of Ralph C. Bailey.)

at the rate of eight per cent per annum as indicated by notes and mortgages held by the bank are to be applied by the bank toward the payment of said notes and mortgages. You didn't do that, did you?

A. Well, we did it in some instances directly. Indirectly in other instances. Some instances it wasn't there to get and, of course, naturally that is our fault. I understand that. It is admitted.

Q. You just didn't abide by these instructions, did you? A. As far as it went, yes.

Q. Now, Ralph, don't hedge with me now. Tell the truth.

A. I am not hedging with you. I am just trying to tell you yes as far as it went.

Q. How far does it go then?

A. Directly up until July we put it in there and we got part of it. After that naturally I didn't take the money when I supposed to take it so consequently I didn't get it. That is our error.

Q. You did everything just great up until you established that special account, didn't you?

A. That is admitted.

Q. And from the date of the establishment of the special account, which was the 9th day of July 1952 you completely disregarded the escrow instructions, did you not, aside from occasionally taking some money out of that account?

A. Yes. [146]

Q. I believe you did have a conversation with Mr. Kaye, did you not, after the contract had been put in escrow?

(Testimony of Ralph C. Bailey.)

A. I believe that's right, yes.

Q. Do you recall when that was?

A. I said this morning in my testimony maybe two or three months that I rather think now, looking back on it and trying to think when it was, it was within two or three or four weeks afterwards. I do not recall the month or the day or even whether it was in '51 when this thing started, or '52.

Q. That was the one where you said that Mr. Johnson was there, Phil Johnson?

A. Yes, and I believe further, I don't think Mr. Dworkin was there. I don't recall.

Q. And the topic of that conversation was?

A. Well, apparently Mr. Kaye had learned that we weren't satisfied with the repayment program on the mortgage notes and he came in and he stated to me that he had been informed that we were satisfied and we would go along according to the repayment program and the stipulations of the escrow agreement which was not true, and at that time is when we informed him directly that we were not satisfied with the repayment program.

Q. That was just, that conversation took place very shortly after the contract was—(Interrupted)

A. Fairly shortly, George. I can't remember. It could have been two or three weeks or a month. It could have been a week after. I don't know. [147]

Q. Do you have any recollection as to why you allowed, why you allowed these payments of May, June and July to accrue before you applied them?

A. No, I don't remember and I testified to that

(Testimony of Ralph C. Bailey.)

several times before, and I believe in one case along the line I testified that our attorney advised us to hold them up at that time.

Q. But you don't recall whether he did or not?

A. No, I don't recall whether he did or not.

Q. However, you recall, of course, that the action was filed on the 21st of April, 1952?

A. Well, I knew it was going to happen, yes.

Q. And then on the 21st of July after having held those where, Ralph, do you know or have you ever been able to ascertain yet where you held those funds? A. Yes.

Q. Where were they?

A. In form of cashier's check made payable to A. K. Kaye and or the Bank of Fairbanks. They were held under double custody in a bank vault.

Q. And then you applied them to the note on the 21st of July? A. That's right.

Q. How much work do you think it would require you to ascertain what should be the present unpaid balance on the four notes if you had applied the payments to the satisfaction [148] of the notes as they were received?

A. Possibly a couple of hours.

Q. You will be able to do that this evening for us?

A. I won't promise. I will make an attempt to.

Q. For the purposes of making that computation you will certainly need this payment book, will you not, receipt book as you termed it?

A. If it will please you, I will use the bank

(Testimony of Ralph C. Bailey.)

records here which I think will coincide here and I have already checked it off as to payments, etc.

Q. Do the payments in this book here coincide entirely in their entirety with your payment book?

A. They do.

Mr. McNabb: I am going to move to admit Defendant's Identification A into evidence, your Honor.

Mr. Johnson: That's all right. It's already been admitted, hasn't it?

Mr. McNabb: It has not. You evidently have no objection?

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "3".

(Defendant's Identification A was received in evidence as Defendant's Exhibit No. "3".)

Clerk of Court: Defendant's Identification D.

(Receipt from Bank of Fairbanks dated 8-10-54 was marked Defendant's Identification D.) [149]

Clerk of Court: Defendant's Identification E.

(Receipt from Bank of Fairbanks dated 8-10-54 was marked Defendant's Identification E.)

Q. (By Mr. McNabb): Now, of course, Mr. Bailey, you know that this book, receipt book is not now complete, do you not?

A. That is correct.

Q. And in what fashion is it not complete?

A. The only thing that is not entered on there, I believe in checking it during the lunch hour, is

(Testimony of Ralph C. Bailey.)

the August 10th payment which has been received.

Q. I will show you Defendant's Identification D and E and ask you if you know what those are, please?

A. They are receipts of the payment or payments made August 10 and there is two hundred dollars principal, seventy dollars, thirty-three cents interest on the fifteen thousand portion of the loan at eight per cent, and fifty-seven dollars, fifty cents, six per cent on the eleven thousand five hundred, which represents the August 10 payment.

Q. Mr. Bailey, you have I take it carefully examined the records in reference to the payment of this amount of money and you no doubt note the amount that the interest decreases each month on the sum of fifteen thousand dollars, if equal monthly installments at the rate of two hundred are paid on it? [150] A. That is correct.

Q. You know what that is?

A. I realize that, yes.

Q. Those payments, the interest reduces at a steady rate each month, does it not, and the payment books and your records indicate that such has occurred since Josephine Boussard first started making her payments on this?

A. On the escrow portion, that's correct.

Q. But, the indebtedness of Mr. Kaye has not been so reduced, has it?

A. No, that is correct.

Q. If the entries on these identifications were put in the book this payment book would be total

(Testimony of Ralph C. Bailey.)

and complete and full and accurate record of the payment made by Josephine Boussard to date, would they not? A. That's correct.

Mr. McNabb: Your Honor, I am going to move the admission of Defendant's Identification D and E.

Mr. Johnson: We have no objections, your Honor.

The Court: It may be admitted.

Clerk of Court: Identification D is Defendant's Exhibit No. "4", and Identification E is Defendant's Exhibit No. "5".

(Defendant's Identification D was received in evidence as Defendant's Exhibit No. "4".)

(Defendant's Identification E was received in evidence as Defendant's Exhibit No. "5".)

Mr. McNabb: I have no further questions.

Redirect Examination

Q. (By Mr. Johnson): Mr. Bailey, this special account that has been referred to, at the time it was set up did Mr. Kaye or Mrs. Kaye offer any objection to that procedure?

A. I don't rightfully recall, but evidently not. We had, Mrs. Kaye was not a signer on the account if I recall correctly. It was just Mr. Kaye. He was aware of it and he would have to be aware of it even though I do not recollect the conversation in regard to the account when it was opened.

Q. Did Mrs. Boussard ever offer any objection to it?

Mr. McNabb: Now, just a minute. I am going

(Testimony of Ralph C. Bailey.)

to object to that, no proper foundation being laid to, no showing that she had any knowledge of it, not proper redirect examination, has no bearing on the issues of this case.

The Court: Objection overruled.

Mr. Bailey: She was not aware of it as far as I know.

Q. (By Mr. Johnson): In this contract which is Defendant's Exhibit "2", counsel referred to a paragraph in the escrow instructions whereby you are instructed further at the outset, from the outset that payments of two hundred dollars plus interest [152] accrued at the rate of eight per cent per annum as indicated by notes and mortgages held by the bank are to be applied by the bank toward the payment of said notes and mortgages. Had you at any time prior to this, or the negotiations of this agreement agreed to accept those two hundred dollar payments as complete payments on the four notes that you had held at that time?

A. No.

Q. And subsequent or around the time that this contract was being negotiated you say you had some conversations with Mr. Dworkin? A. I did.

Q. And during those conversations he attempted or wanted you to accept this arrangement?

Mr. McNabb: Now, just a minute. I object to that as being improper recross examination, no proper foundation laid for it, no such testimony in the record.

The Court: Objection overruled.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): Mr. Dworkin had attempted to or—(Interrupted)

Mr. McNabb: Now, I object to that as being leading and suggestive. Now start over.

The Court: Objection overruled.

Q. (By Mr. Johnson): Mr. Dworkin at the time this contract was being negotiated, did he attempt or anyone to get you or the Bank of [153] Fairbanks, to get you to agree to accepting this in lieu of the payments provided for by the notes and mortgages? A. He did.

Q. Did you agree to make any such change in the provisions of the notes and the mortgages?

A. We did not.

Q. Did you sign any writing of any kind at any time to that effect? A. No.

Q. After this contract was placed in escrow and you began receiving payments and they were credited on the Kaye obligations you say you had a talk with Mr. Kaye after that at which time you insisted that he must keep up the other payments that were due on the notes as well; is that correct?

A. That's correct.

Q. And when he failed to do that in April or up to six months, when in April of 1952 it was at that time that the bank decided to exercise its right to foreclose its mortgages; is that correct?

A. That's correct.

Q. And this present case was filed at that time?

A. It was.

(Testimony of Ralph C. Bailey.)

Q. Under the provisions of the mortgages which gave you that right; is that correct?

A. That's correct.

Q. After that you did accept and receive some payments on account? [154]

A. We did.

Mr. McNabb: On account of what?

Q. (By Mr. Johnson): On account of Kaye's mortgages, but in filing your suit you had declared the entire balance due; is that correct?

A. That's correct.

Q. And they were due or past due at that time?

A. That's right.

Q. The four notes that are now in litigation here and this case has been dragging on ever since that time waiting to get to trial; is that correct?

A. That is my understanding.

Q. And during that time payments have been made from time to time by Miss Boussard which substantially have been credited to the Kaye obligations, is that so? A. That's right.

Q. And the special account which was set up in July was set up after you had declared these Kaye notes to be due and owing and had filed your suit; isn't that correct? A. That's correct.

Q. Do you have that special account ledger?

A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 11, consisting of two sheets. [155]

(Testimony of Ralph C. Bailey.)

(Ledger sheets (2) of A. L. Kaye, Special Account, in Bank of Fairbanks, were marked Plaintiff's Identification No. 11.)

Q. (By Mr. Johnson): Now, I will show you Plaintiff's Identification No. 11 which consists of two sheets and ask you to identify it, if you can?

A. Part of the permanent records of the bank on the account of A. L. Kaye, Special Account.

Q. Is that the account ledger sheet or the ledger sheet of the account which was set up in July of 1952? A. It was.

Q. And does it show all of the deposits and withdrawals that were made to that account from its inception down to date? A. It does.

Q. Is it true and correct so far as you know?

A. I beg your pardon, not to date. This goes on to a period of time. We quit putting it into the account July 14, 1953. That was the last one.

Q. Well, I mean any sort of deposits whether they came from the Boussard payments or what, those sheets show all deposits and all withdrawals that were made? A. That's correct.

Q. And the present balance?

A. Yes. [156]

Mr. Johnson: We would like to offer in evidence Plaintiff's Identification 11, if the court please.

Mr. McNabb: I am going to object to that as having no bearing on the issues of this case, and having no part in it. If the plaintiff established a special account for the benefit of Leo Kaye in con-

(Testimony of Ralph C. Bailey.)

travention of the agreement of these parties and placed moneys there, it has no bearing on the outcome of this case nor on any of the issues involved herein, your Honor.

Mr. Johnson: If the court please, counsel has made a great deal about this special account in cross examination and I think the court should be apprised of what the facts are concerning it.

The Court: Objection overruled. It may be admitted.

Clerk of Court: Plaintiff's Exhibit "J".

(Plaintiff's Identification No. 11 was received in evidence as Plaintiff's Exhibit "J".)

Q. (By Mr. Johnson): Now, Mr. Bailey, previously I believe you stated that you would during this recess or the recess after today compile a statement of receipts and disbursements in your own handwriting, identifying the items for the benefit of the court? A. I will.

Q. From the records which have been introduced? A. I will. [157]

Mr. Johnson: Subject to that, subject to the right to present that statement, if the court please we have no further questions.

Recross Examination

Q. (By Mr. McNabb): Ralph, I would like to ask you one, two questions, I would like you to examine the four notes which are in evidence and tell me whether it is not true that on fifteen thousand dollars worth of indebtedness which was due

(Testimony of Ralph C. Bailey.)

to the bank from Mr. Kaye on the 9th day of November, 1951, the day upon which Josephine Boussard first commenced making payments, is it not true that the six months preceding you received two hundred seven dollars, seventy-eight cents as entire payment on fifteen thousand and in the period six months following her receipt, that you received twenty-one hundred seventy-two dollars?

Mr. Johnson: If the court please, I don't quite understand the purpose of the question. After all, what happened prior to the time of this contract certainly has no bearing on the case. It is admitted all the way around that at the time the contract was signed on October 9, 1951 there was presumably fifteen thousand in principal due the Bank of Fairbanks from the Kaye's. What they had paid prior to that time and I understand it to be the import of Mr. McNabb's question certainly couldn't have any bearing on the situation. I don't care particularly but because the evidence is there, [158] but would show it anyway.

The Court: I didn't understand that his question would include such a thing as that.

Mr. Johnson: Maybe I misunderstood. That was my understanding of the question.

The Court: I understood you were to give the total of the whole situation as shown by the total.

Mr. Bailey: What do you want to know, what I can take from these notes now?

Q. (By Mr. McNabb): I want to know if it is not true that on the six months preceding the date

(Testimony of Ralph C. Bailey.)

that Josephine Boussard took over the payments to the bank of the defendant, evidenced by those notes, in the six months immediately preceding her assumption of those notes, you received next to nothing, two hundred or less in payments?

A. I know nothing about assumption of any notes.

Q. And in the six months immediately afterwards you received very near twenty-two hundred?

A. That is true. That takes another calculation. If you care to take a recess.

Q. No, it doesn't either. You have already testified that there was two thousand one hundred seventy-two dollars, eighty-seven cents paid in the first six months after she took over. That is a matter of record?

A. Yes, you are right there. [159]

Q. Now, if you will go back by an examination of those notes and there take only just a moment, you will be able to testify that in the preceding six months that you received about two hundred on fifteen thousand dollars worth of debts, all of which notes had been in default and one of them since 1945?

A. You are speaking of interest and principal both?

Mr. Johnson: Well, I will still raise the point, your Honor, that what difference does it make? I can't see that it has any bearing whatever.

The Court: Well, I wanted something here that had the total received and total paid out, and what

(Testimony of Ralph C. Bailey.)

the credit would be and debit, whatever it is. Mr. Bailey, as I understood was to prepare that. That is what I think it means.

Mr. Bailey: Well, yes, I had received interest on these notes before this contract was consummated, or its inception.

Q. (By Mr. McNabb): I know, Ralph. I know that you had. I want to make it, if I can by your testimony, abundantly obvious to the court that the bank was stuck with fifteen thousand dollars worth of notes and that in the preceding six months you had received about two hundred dollars worth. Now, you have already testified that you knew Josephine Boussard to be a good credit risk and her subsequent conduct has proven that point of yours to have been true? [160]

A. That's correct.

Q. Now, I want to show this court that the bank was holding fifteen thousand dollars worth of notes on Leo Kaye that you had received about two hundred dollars or perhaps less in the preceding six months, and that you had an opportunity to have those notes paid off without the necessity for a lawsuit and someone you knew or you had good reason to believe would in fact pay them off, and her subsequent conduct proved that such was her intention, and she has gone about that in a most business-like fashion?

A. I can't answer that question.

Mr. Johnson: We object, if the court please, on the ground that it is not within the issues. The

(Testimony of Ralph C. Bailey.)

bank had perfectly good security for its indebtedness.

Mr. McNabb: Answer the question, Ralph. The Judge has not overruled it.

Mr. Bailey: We have, your Honor, yes, received in interest payments various intervals before the contract of sale came into effect and that we had received no principal payments in any preceding that.

Q. (By Mr. McNabb): Or interest?

A. Well, interest, that's right.

Q. What payments if any were made from and after the 1st day of June, 1951 on Exhibit "E" until Josephine Boussard made a payment on or about the 9th of November, or 8th of October? [161]

A. We received two interest payments on Exhibit "E".

Q. On June, from the month of June '51?

A. Yes, one in September and one in October '51.

Q. And how much were they?

A. One of one hundred sixty-four dollars, and the other one six dollars, thirty-eight cents.

Q. 9-11-51, that is the 9th day of November, is it not? A. That's right.

Q. And the previous payment made on that note was what? A. March 16th.

Q. So in the preceding six months there was no payment made on that, not principal or interest? A. That's correct.

Q. That is what I wanted testified to. Now then,

(Testimony of Ralph C. Bailey.)

look on "G". What payments did you receive between the first of June, 1951 on that note?

A. On the same date?

Q. No payment in the preceding six months?

A. That's right.

Q. Now, what have we here? "E", "G", what about "C"? A. "D" is the same.

Q. No payments on principal or interest either one, just as the other two. Now then, on "I" you did receive a payment, did you not?

A. No, it is the same as those.

Q. The same as that? [162]

A. That's right.

Q. No payments at all in the preceding six months on the entirety of the fifteen thousand dollar obligation; and then Josephine Boussard took over and in the proceeding six months you received two thousand dollars.

Mr. Johnson: We object to the statement Josephine Boussard took over, your Honor.

The Court: Objection overruled.

Mr. Bailey: That's right.

The Court: We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:50 p.m., the court took a recess until 4:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel ready to proceed?

Mr. Johnson: We are ready, your Honor.

The Court: Call your witness.

Mr. Johnson: I have no further witnesses at this time, and subject to the right of Mr. Bailey to submit the statement which the court wants, we rest.

Mr. McNabb: Your Honor, then at this time I am going to move the court for a verdict in favor of defendants on the grounds that the plaintiff has failed to establish a prima facie case, the plaintiff being a corporation, a domestic corporation of the Territory of Alaska and has failed to prove by sufficient evidence that it has paid its annual tax and [163] filed its annual report as is required by domestic corporations before it can proceed in an action in the Territory of Alaska.

The Court: Motion denied.

Mr. McNabb: I would like to call Mr. Dworkin, please.

LAZAR DWORKIN

a witness called in behalf of the defendants, was sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): State your name, please.

A. Lazar Dworkin, 225 Wendell Street.

Q. Mr. Dworkin, how long have you resided in Alaska, Fairbanks, Alaska?

A. Since May, 1947.

Q. You are, I believe, familiar with a real estate contract concerning some property, real and personal property being the property of Leo and Jean Kaye and upon which the Bank of Fairbanks held four notes? A. I am.

(Testimony of Lazar Dworkin.)

Q. Were you at any time appointed as an agent to secure a purchaser of that property by Mr. Kaye?

Mr. Johnson: We object to that as being merely a conclusion, if the court please, and no proper foundation laid. He can't make himself an agent by his own testimony.

The Court: Objection will be sustained.

Q. (By Mr. McNabb): Did you at any time have any conversations with Mr. [164] Bailey of the Bank of Fairbanks concerning the sale by Mr. Kaye of his interest in the property upon which the bank had mortgages? A. I did.

Q. Do you recall the month during which you had such a conversation with Mr. Bailey?

A. Sometime during October, 1951.

Q. What was the purpose of discussing that property with Mr. Bailey?

Mr. Johnson: Well, if the court please, that is calling for a conclusion which the witness isn't qualified to make. We object to it. I think he can relate any conversation or the substance of them, but the purpose is certainly a conclusion.

The Court: I take it this is to show the interest of Mr. Bailey, the witness, in the property.

Mr. McNabb: Not at all, sir, not the interest of Mr. Bailey, but the, it was, I am not going to testify in reference to this matter. If the court chooses to sustain the objection I will rephrase the question, your Honor.

The Court: Well, I will sustain the objection.

(Testimony of Lazar Dworkin.)

Q. (By Mr. McNabb): What was said during that conversation between you and Mr. Bailey in reference to the property of Mr. Kaye?

A. I advised Mr. Bailey in the early part of October 1951 that I had a proposed purchaser for the property and I [165] wished to see the amount of the indebtedness that was due against the property. He took out a number of notes and mortgages aggregating approximately fifteen thousand dollars all of which were due and overdue and I told him that in order to make the transaction, unless they agreed to take a stipulated amount every month no purchaser could risk going in there and the possibility of being foreclosed. And I told him I had a definite purchaser who would be willing to pay two hundred a month, plus interest. He told me no it really wasn't sufficient, he wasn't satisfied with it. Then he said, who was the purchaser and I gave him the name of the proposed purchaser, Miss Boussard. He said he knew her, said he would like to talk to her. I called Miss Boussard, told her to go see *Miss Boussard,* which she did. He turned her down. He called me up and told me he wasn't satisfied with the amount of the payments so I called him again the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted, I think we will go along provided you designate the Bank of Fairbanks as the escrow agent and number two that the payments be made directly to the bank for the amount equivalent of the unpaid indebted

(Testimony of Lazar Dworkin.)

ness. He called Mr. Hurley while I was there and furnished him all the figures in the respective amounts. Mr. Hurley was to draft the papers. Mr. Hurley was indisposed about ten or twelve days, so I secured the papers and took them to Mr. Rivers and Mr. Rivers drew up all the papers. [166]

Q. After the papers were prepared and executed who placed them in escrow, if you know?

A. After the papers were all executed I took them in to the bank. I took them to the escrow window, I believe it was Phyllis Gidden, and said you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the escrow window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book.

Mr. McNabb: You may take the witness.

Cross Examination

Q. (By Mr. Johnson): I believe you stated that you had two conversations with Mr. Bailey, is that correct? A. That's right.

Q. And though one of them took place in the latter part of October; one took place in the first part of October and the next one took place in the latter part of October; is that right?

A. Well, I would like to correct that, Mr. Johnson. I don't know. I know it was during the month of October.

Q. And both of these conversations you say you had with Mr. Bailey where?

(Testimony of Lazar Dworkin.)

A. At the Bank of Fairbanks.

Q. But you are not certain when the second conversation took place? [167]

A. You mean by the exact date, I don't.

Q. Well, you say they took place in October, that is a reasonably short while altogether, it is about thirty-one days. Now did you have these conversations in the first half of October or in the last half of October?

A. I would say it was the early part of October, but they were within a pretty brief time because after the first conversation he wanted to have a check with my buyer and I sent Miss Boussard down to talk with him.

Q. Now, what consideration, if any, did you give to Mr. Bailey or the bank for this alleged agreement that you say he entered into?

Mr. McNabb: Now, just a minute. I object to that. There is no showing that there was any agreement entered into between Mr. Dworkin and the bank, and even if there was one, it has no bearing on the issues of this case and not binding on the parties here.

The Court: Objection sustained.

Q. (By Mr. Johnson): Isn't it a fact that Mr. Bailey told you specifically that he could not accept the proposal that you had made under any consideration as a full payment of the moneys due on the Kaye notes?

A. That is not a fact, Mr. Johnson.

Mr. Johnson: That's all.

(Witness excused.) [168]

Mr. McNabb: I would like to call Mr. Kaye if I may.

LEO KAYE

one of the defendants, appearing as a witness in his own behalf, was sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): Will you state your name, please, sir. A. Alvin Leon Kaye.

Q. And you reside in Fairbanks, Mr. Kaye?

A. I do.

Q. Are you one of the defendants in this action?

A. I am.

Q. Did you on the 9th day of November of 1951 have outstanding and unpaid to the Bank of Fairbanks any promissory notes? A. I did.

Q. Were those notes at that time in default?

A. They were.

Q. In what amount were they, the aggregate amount?

A. Approximately fifteen thousand dollars.

Q. Since that date, Mr. Kaye, and by that I mean the 9th day of November 1951, have you made any payments toward the satisfaction of any indebtedness which you had on November 9, or presently do have? A. No.

Q. To the Bank of Fairbanks? [169]

A. No.

Q. You have made no payments on any of those notes? A. No.

Mr. McNabb: I have no further questions.

Mr. Johnson: No questions.

(Witness excused.)

Mr. McNabb: Your Honor, the defendant rests.

The Court: Very well. We will take a recess then until morning and we want just those figures that Mr. Bailey is going to produce.

Mr. McNabb: Yes, your Honor.

Mr. Johnson: I may want to recall Mr. Bailey tomorrow morning for a question or two. I am not certain at this time.

The Court: Very well, either side can have the same opportunity.

Mr. Johnson: Yes.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:15 p.m., August 17, an adjournment was taken to 10:00 a.m., August 18, 1954.) [170]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 18, 1954, plaintiff and defendant both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

Mr. Johnson: If the court please, yesterday Mr. Bailey was requested to make up a statement of the matters pertaining to the plaintiff's case and he informed me this morning that he is not ready with that statement and would like until two o'clock this afternoon to present it. Therefore, we move for a recess in the case now until two o'clock this afternoon.

Mr. McNabb: There is no objection on the part of the defendant, your Honor.

The Court: Very well. The motion is granted.

Clerk of Court: Court is at recess until two o'clock this afternoon.

(Thereupon, at 10:05 a.m., the court took a recess until 2:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial of the case of Bank of Fairbanks vs. Kaye?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: The defendant is ready, Judge.

Mr. Johnson: Mr. Bailey, will you take the stand.

Clerk of Court: You have been sworn Mr. Bailey before, sir. [171]

RALPH C. BAILEY

a witness appearing on behalf of the plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Johnson): Mr. Bailey, since we were last in session have you had an opportunity to make a summary of the facts and figures concerning this matter as shown by the records of the bank which records have been admitted in evidence? A. I have.

Q. Do you have that record with you?

A. I do.

Mr. Johnson: Or summary.

(Testimony of Ralph C. Bailey.)

Clerk of Court: Plaintiff's Identification 12.

(Three work sheets prepared by the witness, Bailey, were marked Plaintiff's Identification No. 12.)

Q. (By Mr. Johnson): I will show you a joint identification and will ask you if that is the summary that you mentioned a minute ago?

A. It is.

Q. And is that in your handwriting?

A. It is.

Q. And is it true and correct as far as you are able to determine? A. It is. [172]

Mr. Johnson: We would like to offer this, if the court please.

Mr. McNabb: Do you have any other questions that you want to ask, Maurice, concerning this.

Mr. Johnson: No, I want to ask him one or two questions.

Mr. McNabb: Why don't you go ahead.

Mr. Johnson: All right.

Q. (By Mr. Johnson): Mr. Bailey, yesterday when Mr. McNabb was questioning you concerning the payments which had been made on the notes in question here prior to October 6, 1951 for a six months period prior to that time, it appeared from your testimony that the payments were less than had been made on the notes, that is six months period following October 6, 1951; do you have any explanation of how that might have arisen or come about?

Mr. McNabb: Wait just a minute now. I don't

(Testimony of Ralph C. Bailey.)

understand that question at all, your Honor. I don't know what he is getting at. It is too vague and too indefinite. I don't see what he is trying to prove. I object to it for that reason.

The Court: Will you make it a little clearer, Mr. Johnson.

Mr. Johnson: If the court please, yesterday Mr. McNabb in his examination of Mr. Bailey went into great lengths [173] to point out or have Mr. Bailey point out that the Kaye's had made very few payments on their indebtedness for the six months prior to October 6, 1951, which was the date that this contract of purchase and sale was entered into. Then as contrasted with that he had Mr. Bailey point out by looking at the notes that the first six months after this contract of purchase and sale was entered into that a considerable amount of money had been paid on the notes and was credited on the notes. I assume the purpose of that was to point out that the payments under the escrow were far greater than Kaye's had been willing to do by themselves and I thought that that opened the door for us to show why it was that during the six months period prior to the sale of the house the Kaye's hadn't made any particular payments on these notes, and why the bank had been willing to go along with that, and I thought that I would ask Mr. Bailey if he knew anything about the reasons why the bank did not require it.

The Court: You understand now what he wants?

Mr. Bailey: Yes, I do.

(Testimony of Ralph C. Bailey.)

The Court: Very well, will you answer?

Mr. McNabb: Now, I am going to object to tha questioning as not being proper redirect examina tion and it is not at this time material, doesn' have any bearing on the issues of this case. If ther was any such agreement there has been no prope foundation laid for it. It may call for hearsay testi mony and it is not within the issues. [174]

The Court: Objection overruled. Go ahead an answer it.

Mr. Bailey: During that six months period w had been pressing Mr. Kaye for payment.

The Court: Are you speaking of before or after

Mr. Bailey: Before the contract of sale was ent ered into, your Honor. We had had several occa sions to talk about payment on the unpaid principa balance of the notes. He indicated to me that h was proposing to sell the piece of property an therefore we did not push the matter at that par ticular time. No bank cares for a foreclosure. Con sequently, we let it ride for a period of six o seven months before we received anything on th notes.

Q. (By Mr. Johnson): Then he did go ahea with a sale on October 6; is that right?

A. That's correct.

The Court: October 3, wasn't it?

Mr. Bailey: The sale was on October 9, '51.

The Court: I was getting the date of the com mencement of the action.

Mr. Johnson: The commencement of the action

(Testimony of Ralph C. Bailey.)

your Honor, was five months later, in April of '52.

The Court: May I see that.

Mr. McNabb: Is this what you want, sir? It has not been admitted. [175]

Q. (By Mr. Johnson): Yesterday I believe you were in court when Mr. Dworkin was on the stand?

A. That is right.

Q. And I think you heard his testimony?

A. I did.

Q. As an officer of the bank at the time you talked with Mr. Dworkin would you have any authority to enter into such an agreement as mentioned?

Mr. McNabb: Now just a minute. I am going to object to that as calling for a conclusion, not within the issues of this case, no bearing on the issues of this case, no allegations that there was any such agreement.

The Court: Objection overruled.

Mr. Bailey: Not without authority from the Board of Directors of the corporation.

Mr. Johnson: That's all.

Mr. McNabb: You have no more questions, Maurice?

Mr. Johnson: No, I am through. We offer that in evidence.

Mr. McNabb: You don't have to renew. There is no occasion for it.

Mr. Johnson: Do you want to ask Mr. Bailey any more questions.

Mr. McNabb: Only as what may result from my

examination of this instrument. May we have jus
a few [176] minutes recess, Judge, so that I ma
examine this.

The Court: Ten minutes enough.

Mr. McNabb: Yes, I am sure it will be.

Clerk of Court: Court is recessed for ten min
utes.

(Thereupon, at 2:15 p.m., the court took
recess until 2:25 p.m., at which time it recon
vened and the trial of this cause was resumed.

The Court: Counsel ready to proceed.

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Yes, your Honor.

RALPH C. BAILEY

the witness under examination at the time the re
cess was taken resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Now, Mr. Bailey, on th
compilation which you have just made, I show yo
Sheet Number 1, that sheet indicates that payment
were received by the bank on escrow 691, that i
the escrow concerning the property which the mort
gages were on and which mortgage secured th
notes from Leo Kaye to the bank. That is correct
is it not?

A. Not quite correct. Partially, yes. You sai
the escrow that secured the notes. That is not cor
rect. The property secured the notes. The escrow
that was in the bank that we derived funds fro
to apply against the note.

(Testimony of Ralph C. Bailey.)

Q. Yes, this is the same property that is involved? [177] A. That's correct.

Q. Your sheet shows that the bank received payments on escrow 691 on November 9, December 10, February 11, 10th of April and the 8th, 9th of March and the 8th of April. On each of those occasions the bank applied those payments directly to the payment of the notes; is that not correct?

A. That's correct.

Q. Now then, following that, the May, June and July payments were, the May, June payments were held in, I believe you said by cashier's check?

A. That's correct.

Q. And then on the 9th of July they were deposited to a special account of Leo Kaye which was then established on that date?

A. Not on the 9th of July, but on the 11th of July.

Q. On the 11th of July, and on the 21st of July the bank by debit memo applied nine hundred fifty-seven dollars toward, and eighty-two cents toward the payment of the notes?

A. To the payment of the note.

Q. Part of it to principal, part to interest?

A. That's correct.

Q. Now then, following that the payments were made continuously as called for by the contract, the August payment commencing in August and each month through, that is August of 1952 through July the 10th of 1953, the proceeds of the payments were deposited in the Kaye special account?

(Testimony of Ralph C. Bailey.)

A. Correct.

Q. Now that, all of those things are indicated on Page 1 of your exhibit. Now then, let's back up, and the bank by depositing those payments, that is from September 9th, '52 through June the, or July the 10th '53, plus eighty-six dollars, sixty-nine cents or a total of four thousand one hundred forty-four dollars and seventy-one cents was deposited to the Leo Kaye special account, that is twelve consecutive payments were deposited to the account. What became of that money, Mr. Bailey, four thousand one hundred forty-four dollars, seventy-one cents?

A. That was used during the normal course of business of Mr. Kaye and also by other debit memos to the account.

Q. Let me ask you this, sir, was any of that amount of money applied toward the liquidation of the Kaye note? A. No.

Q. None of it? A. No.

Q. Now then, when the bank deposited the money, that is this four thousand one hundred forty-four dollars, seventy-one cents to the account of Leo Kaye, the Leo Kaye special account, it did that in contravention of the escrow instructions attached to escrow No. 691, did it not?

A. I answered that both yes and no.

Q. Well, the escrow instructions do in fact provide that two hundred dollars a month plus interest on fifteen [179] thousand dollars to be ap-

(Testimony of Ralph C. Bailey.)

plied toward the reduction or the liquidation of the Kaye notes, does it not?

A. That's correct.

Q. And by depositing this money to Mr. Kaye's account the bank then put that, or those funds in a position from which Mr. Kaye could draw against? A. That's right.

Q. And in fact he did draw against it?

A. He did.

Q. And there is in the escrow instructions attached to that contract, it provides specifically that the money, two hundred a month plus interest on fifteen thousand was to be applied toward the satisfaction of those notes, was it not?

A. That's correct.

Q. That wasn't done with these twelve consecutive monthly payments?

A. That's correct.

Q. Now then, we go to sheet number 2; the payments received by the bank under the escrow commencing on the 10th day of August and each month thereafter through the 10th day of December all dates in '53, those payments again were held? A. Correct.

Q. And that is, you did the same thing with those as you did the payments of May, June and July of 1952? A. That's correct.

Q. That is for a year you deposited the money to the [180] account of Kaye and then you reverted to your previous stand that is the stand that you took in May, June and July of '52 and held

(Testimony of Ralph C. Bailey.)

four payments? A. That's correct.

Q. And what became of those funds?

A. Those were disbursed to the various different notes on interest on December 11 and December 18th.

Q. Of 1953?

A. Of 1953, and the final of three hundred twenty-nine dollars, twenty-five cents was disbursed on January 13, 1954.

Q. Now, actually, Mr. Bailey, the interest on the notes on the unpaid balance of the notes as of July 21, 1952 continued to run at the rate of eight per cent, though the bank had in fact received seventeen payments and though the money was or had been available to the bank to apply to that indebtedness, nothing was done for a period of seventeen months during which the interest on that fifteen thousand, or the balance of fifteen thousand as of July 21, '52 continued to run?

A. It continued to run. There is a rectification there that should be made. I mean in the earned interest, yes. That is admitted.

Q. The interest continued to accrue and the bank had the funds or at least the bank had at one time had the funds to apply toward that principal reduction, which of course would have reduced the interest? [181]

A. That's correct, and we would only be entitled to the unpaid balance.

Q. Those funds were received and that situa-

(Testimony of Ralph C. Bailey.)

tion continued for a period of seventeen months?

A. Well, not consecutively.

Q. Yeah, consecutively, because the last money that was applied against the note was the 21st of July '52, and nothing at all was applied until when, December 11, 1953?

A. Yeah, that is agreed.

Q. And every one of those months payments had been made? A. That's right.

Q. And then following the holding of the payments as you did, commencing in August of '53 and continuing to do so until December the 10th of '53, commencing again on the first, the 13th day of January 1954 and from and after each month thereafter the payments were applied toward the satisfaction of the Kaye notes directly without having deposited them to the Kaye special account so actually at one time you testified that this Kaye special account which was set up on the 9th of July, '52, was done for a matter of record keeping, your conduct prior to the 9th of July indicates that it was not necessary and you evidently feel that it was, or is it true now or at any time did you not believe that that might have been a mistake?

A. If it had worked like it should have worked, it [182] would not have been a mistake, but unfortunately circumstances weren't such that it worked satisfactorily. Consequently we eliminated it at a later date.

Q. In fact, at least a portion of four thousand

(Testimony of Ralph C. Bailey.)

one hundred forty-four dollars, seventy-one cents went some place and was not applied against the notes? A. That's correct.

Q. And for that reason you held them again for awhile and then later applied the payments directly as they came to you?

A. That's correct. The reason we held them, if I recall correctly, after thinking about this for two days, it was felt that we did not want to apply any further payments to the notes either until we went into court or did not go into court, but after we held those funds in the bank account and we didn't get them, it is admitted that was a poor way to do it.

Q. In fact, when you did deposit it to the special account and thereby made them available to Mr. Kaye you acted contrary to the escrow instructions?

A. I still say yes and no on that for the simple reason of this, I think and I believe it is the bank prerogative to deposit those to accounts and come back and apply those payments. Of course, the funds were there, had been there, then we would have been within our legal right.

Q. Well, I know, Ralph, but let me say this you did [183] not obey the written word of the escrow instructions when you did not apply the proceeds?

A. We didn't get the job done. Yes, then we were not correct.

Mr. McNabb: Your Honor, I believe that all of

(Testimony of Ralph C. Bailey.)

the figures as set out in this Exhibit are entirely correct and state the question quite accurately to the court.

The Court: They may be admitted then.

Clerk of Court: Plaintiff's Exhibit "K".

(Plaintiff's Identification No. 12 was received in evidence as Plaintiff's Exhibit "K".)

Mr. McNabb: I have no further questions, Ralph.

Mr. Johnson: We have nothing further.

(Witness excused.)

The Court: How much time do you want for argument?

Mr. McNabb: Your Honor, Mr. Johnson and I had tentatively agreed on forty-five minutes per side.

Mr. Johnson: That is agreeable as far as I am concerned. I don't think we need that much.

The Court: Very well, proceed then.

(Thereupon, Mr. Johnson presented a closing argument to the Court in behalf of the plaintiff.)

(Thereupon, Mr. McNabb presented a closing argument to the Court in behalf of the defendants.)

Mr. Johnson: May we have a recess. [184]

The Court: Yes, we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:20 p.m., the court took a recess until 3:30 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Very well. Proceed, Mr. Johnson.

(Thereupon, Mr. Johnson presented a re buttal argument to the Court in behalf of th plaintiff.)

The Court: Well, it is clear to me that the de fendant, all of the defendants are entitled to preva in this case. It is the law involved and which give the defendant the right to prevail in this case i the law with reference to estoppel, waiver, con tract, and a third party contract and novation. Al of them we pursued end up by giving such a situa tion as arises in this case by giving the defendant in this case a right to a verdict in judgment. hold for the defendants all the way through an against the plaintiff. The attorneys for the defend ants are charged with the duty of drawing up find ings and conclusions of law and decree. They wi do so accordingly.

(Thereupon, at 3:50 p.m., August 18, 195 the trial of this cause was concluded.)

[Endorsed]: Filed February 5, 1955.

[Endorsed]: No. 14653. United States Court o Appeals for the Ninth Circuit. Bank of Fairbanks a corporation, Appellant, vs. A. L. Kaye, Jea Kaye and Josephine Boussard, Appellees. Tran script of Record. Appeal from the District Cour for the District of Alaska, Fourth Division.

Filed: February 11, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals fo the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,653

BANK OF FAIRBANKS, an Alaskan Banking Corporation, Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD, Appellees.

STATEMENT OF POINTS

Pursuant to the provisions of Rule 17 (6) of this Court, the Appellant herewith states the points on which it intends to rely on this appeal, as follows:

I.

That the trial Court erred in denying the Appellant's motion for new trial. The motion for new trial appears at page 82 of the original certified record, and the order denying the motion appears at page 92. A minute order of denial appears at page 87 of the same record.

II.

That the judgment of the trial Court is contrary to the law and the evidence. The said judgment appears at page 78 to 79 of the original certified record.

III.

That the trial Court erred in making the following numbered Findings of Fact: XIV, XV, XVIII,

and XIX in that such Findings are contrary to the evidence. The Findings of Fact appear in the original certified record at pages 68 to 77.

IV.

That the trial Court erred in its Conclusions of Law in that the same are not based upon, nor do they follow from the Findings of Fact; and in that the same are contrary to the evidence adduced at the trial. Said Conclusions of Law appear at pages 76 and 77 of the original certified record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,
/s/ By MAURICE T. JOHNSON,
Appellant's Attorneys

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 25, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to the provisions of Rule 17 (6) of the rules of this Court, the Appellant herewith designates the following parts of the original certified record to be printed in the transcript of the record for the consideration of this appeal:

1. Complaint.
2. Answer and Affirmative Defenses of Defendant Boussard.

3. Answer of Defendants A. L. Kaye and Jean Kaye.

4. Reply to the Answer and Affirmative Defenses of Defendant Josephine Boussard.

5. Reply to the Answer of the Defendants A. L. Kaye and Jean Kaye.

6. Findings of Fact and Conclusions of Law.

7. Judgment.

8. Motion for New Trial.

9. Minute Order denying Motion for New Trial.

10. Notice of Appeal.

11. Supersedeas Bond.

12. Signed Order denying Motion for New Trial.

13. Signed Order extending Time to Docket Cause.

14. Designation of Contents of Record on Appeal.

15. Transcript of Testimony, separately bound, pages No. 1 to 186.

16. Statement of Points on Appeal.

17. This Designation of Record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,
/s/ By MAURICE T. JOHNSON,
Appellant's Attorneys

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 25, 1955. Paul P. O'Brien, Clerk.

No. 14,653

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD,
Appellees.

APPELLANT'S BRIEF.

MAURICE T. JOHNSON,
201 Lathrop Building, Fairbanks, Alaska,
WILLIAM V. BOGGESS,
Room 213, Nerland Building,
545 Third Avenue, Fairbanks, Alaska,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Subject Index

Table of Authorities Cited

No. 14,653

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
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Appellees.

APPELLANT'S BRIEF.

I.

STATEMENT AS TO JURISDICTION.

The jurisdiction of this Court of Appeals is provided by Title 28, USCA, Section 1291, reading in part as follows: "The courts of appeals shall have jurisdiction over appeals from all final decisions of the District Courts of the United States, and the District Court of the Territory of Alaska * * * except where a direct review may be had in the Supreme Court."

Under the provisions of this Act, appeals from reviewable decisions of the District Court for the Dis-

trict of Alaska, or any division thereof, are made to the Court of Appeals for the Ninth Circuit, Title 28, USCA, Section 1294, paragraph 2.

The decision here appealed from is a final decision for the reason that it was the order denying the plaintiff's motion for new trial which made final the judgment of the District Court of the Fourth Judicial Division, District of Alaska, entered in this cause on the 24th day of August, 1954. (TR 70-73.)

II.

STATEMENT OF CASE.

On April 23, 1952, the appellant Bank of Fairbanks, an Alaskan Banking Corporation, filed a Complaint in the court below (The District Court for the District of Alaska, Fourth Division) in which appellant prayed for personal judgment against the appellees A. L. Kaye and Jean Kaye in the amount of the unpaid principal and interest accrued on four promissory notes, for foreclosure of four different mortgages on the same parcel of property, each of which said mortgages secured one of the aforesaid notes. (Appellant's Complaint, TR pp. 3-37.)

The appellee Josephine Boussard was joined in said Complaint as a party upon the theory that she claimed some interest in the property sought to be foreclosed which interest was "subsequent to and subject to the lien" of the appellant's several mortgages. (Paragraph VII of each of the four causes of action contained in said Complaint, TR pp. 6, 10, 13 and 17.)

Separate answers were filed by the appellees Kaye and the Appellee Boussard. The appellees Kaye admitted that they made and delivered each of the said promissory notes to the appellant as payee, that they executed and delivered to the appellant, as mortgagee, each of the several mortgages securing said notes, that appellant was the lawful owner and holder of each of said notes, and that there was due and owing on each of said notes the amounts of principal and interest alleged to be due appellant. (Paragraphs I, II, III, IV and VI of each of appellant's four causes of action as stated in said Complaint, TR pp. 3-6, pp. 7-9, pp. 10-13, pp. 14-16 and Paragraph I of the appellees Kayes' Answer thereto, TR 50.)

Other than the amounts due and owing on each of said notes which were denied for lack of information, the appellee Boussard made the same admissions in her answer as the appellees Kaye. Appellee Boussard also admitted allegations contained in Paragraph VII of each of appellant's four causes of action. (Paragraphs I, II and IV of the answer of the appellee Boussard, TR 38.)

It was alleged by both the appellees Kaye and the appellee Boussard and admitted by the appellant that on October 9, 1951, the appellee Boussard, as Buyer, entered into a Contract of Purchase and Sale with the appellees Kaye as Sellers in which she, Boussard, agreed to buy and the appellees Kaye agreed to sell the very property encumbered by the aforesaid mortgages. (Paragraph I of appellee Boussard's First Affirmative Defense, TR pp. 38, 39 and Paragraph I of the appellees Kayes' Affirmative Defense, TR 51.)

It was further alleged by both the appellees Kaye and the appellee Boussard and admitted by the appellant that said Contract of Purchase and Sale, together with a Warranty Deed to be delivered to the appellee Boussard upon payment in full of the purchase price, was delivered in escrow to the appellant bank, together with instructions to the appellant to apply the payments made on said Contract towards payment of said notes and mortgages. (Paragraph III of the appellee Boussard's First Affirmative Defense, TR 39 and Paragraph I of the appellees Kayes' Affirmative Defense, TR 51.)

In Paragraph II of the appellees Kayes' Affirmative Defense (TR pp. 51, 52) it was alleged "and it was also agreed by and between the plaintiff and defendants that the said notes and mortgages referred to in the four causes of action contained in plaintiff's Complaint would be extended and that the said plaintiff would accept the monthly payments of $200.00 per month, together with the interest due thereon, as payments upon said mortgages and that no further payments would be required to be made by the said defendant or any of them. That it was with this understanding and agreement between the plaintiff and the defendants that the defendants, A. L. Kaye and Jean Kaye, agreed to sell said property to the defendant, Josephine Boussard. That plaintiff accepted said payments and the said defendant, Josephine Boussard, has continued to make said payments each month to the said bank to apply upon said mortgages as agreed by all of the said parties to this

action and the said bank has accepted the same and applied them upon said notes and mortgages in part payment thereof."

Paragraph III of said Affirmative Defense (TR 52) reads in full as follows: "That the said defendants, A. L. Kaye and Jean Kaye, relying upon the promises of the said plaintiff to extend said notes and mortgages and to accept said payments as in said contract provided agreed to sell said property to the said Josephine Boussard and the said plaintiff has waived its right of foreclosure of said mortgages and should be estopped from claiming that it has a right to foreclose said mortgages and sell said property as prayed for in said Complaint on file herein."

Paragraph V of the appellee Boussard's First Affirmative Defense (TR 40) reads in full as follows: "That this defendant fully relying upon the promises and representations made to her and to her agent, by plaintiff's officers, that plaintiff would accept payments to discharge the mortgages set out in plaintiff's Complaint, according to the terms and in the manner as set out in Exhibit "1", she proceeded in good faith to sign said contract and thereafter made payments to plaintiff as aforementioned. That by reason of plaintiff's promises, representations and receipt of payments and interest under said contract, and applying such payments to the said mortgage indebtedness, and in consideration of the mutual agreements, express and implied, of this defendant assuming, taking over and paying off the defendants Kayes' said mortgages, plaintiff has waived its right

of foreclosure on said mortgages and has extended the time for payment thereof and is estopped, being lawfully bound to accept payment of said mortgage indebtedness according to the terms of said Exhibit "1", and this defendant will be subject to irreparable damage if the prayer to plaintiff's Complaint be granted."

It was upon a denial of the allegations of waiver and estoppel that issues were drawn and a trial had in the Court below on the 16th day of August, 1954, and continuing through the 18th day of August, 1954.

At the conclusion of all the evidence and on the 23rd day of August, 1954, the Court below entered its Findings of Fact and Conclusions of Law (TR pp. 56-66) and, on the 24th day of August its Judgment (TR pp. 67, 68) in favor of all of the appellees and against appellant.

On September 2, 1954, appellant filed a Motion for New Trial (TR 69) which was denied by the Court by minute order on the 7th day of December, 1954 (TR 70), and by formal order on December 16, 1954. From the Judgment and the order denying a new trial, appellant appealed to this Court on the 15th day of December, 1954. (TR 70.)

III.

ARGUMENT.

A.

THE FIRST POINT UPON WHICH APPELLANT RELIES ON THIS APPEAL IS THAT THE COURT BELOW ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL. (Point No. I, appellant's Statement of Points, TR 245.)

The first ground of said Motion was that the Findings of Fact and Conclusions of Law and the Judgment were contrary to the evidence. (TR 69.)

First, as to the Findings of Fact, the Court found that "Prior to the 19th day of October, 1951, the day and date upon which the Defendants and each of them executed the contract of purchase and sale to which reference is hereinabove made an agent of the Defendants Kaye discussed the terms and execution of said contract of sale with the Vice President of the Bank of Fairbanks and did make a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions said Vice President did consent." (XIV TR 62.)

This finding is entirely predicated upon the testimony of one Lazar Dworkin upon direct examination (TR pp. 224-227) which, in view of its brevity, is set out herein, in full, as follows:

"Q. (By Mr. McNabb): State your name, please.

A. Lazar Dworkin, 225 Wendell Street.

Q. Mr. Dworkin, how long have you resided in Alaska, Fairbanks, Alaska?

A. Since May, 1947.

Q. You are, I believe, familiar with a real estate contract concerning some property, real and personal property being the property of Leo and Jean Kaye and upon which the Bank of Fairbanks held four notes?

A. I am.

Q. Were you at any time appointed as an agent to secure a purchaser of that property by Mr. Kaye?

Mr. Johnson: We object to that as being merely a conclusion, if the court please, and no proper foundation laid. He can't make himself an agent by his own testimony.

The Court: Objection will be sustained.

Q. (By Mr. McNabb): Did you at any time have any conversation with Mr. (164) Bailey of the Bank of Fairbanks concerning the sale by Mr. Kaye of his interest in the property upon which the bank had mortgages?

A. I did.

Q. Do you recall the month during which you had such a conversation with Mr. Bailey?

A. Sometime during October, 1951.

Mr. Johnson: Well, if the court please, that is calling for a conclusion which the witness isn't qualified to make. We object to it. I think he can relate any conversation or the substance of them, but the purpose is certainly a conclusion.

The Court: I take it this is to show the interest of Mr. Bailey, the witness, in the property.

Mr. McNabb: Not at all, sir, not the interest of Mr. Bailey, but the, it was, I am not going to testify in reference to this matter. If the court chooses to sustain the objection I will rephrase the question, your Honor.

The Court: Well, I will sustain the objection.

Q. (By Mr. McNabb): What was said during that conversation between you and Mr. Bailey in reference to the property of Mr. Kaye?

A. I advised Mr. Bailey in the early part of October 1951 that I had a proposed purchaser for the property and I (165) wished to see the amount of the indebtedness that was due against the property. He took out a number of notes and mortgages aggregating approximately fifteen thousand dollars, *all of which were due and overdue* and I told him that in order to make the transaction, unless they agreed to take a stipulated amount every month no purchaser could risk going in there and the possibility of being foreclosed. And I told him I had a definite purchaser who would be willing to pay two hundred a month, plus interest. He told me no, *it really wasn't sufficient, he wasn't satisfied with it.* Then he said, who was the purchaser and I gave him the name of the proposed purchaser, Miss Boussard. He said he knew her, said he would like to talk to her. I called Miss Boussard, told her to go see 'Miss Boussard', which she did. *He turned her down.* He called me up and told me he wasn't satisfied with the amount of the payments, so I called him again the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted. *I think we will go along* provided you designate the Bank of Fairbanks as the escrow agent and number two, that the payment be made directly to the bank for the amount equivalent of the unpaid indebtedness. He called Mr. Hurley while I was there and furnished him all the figures in the respective

amounts. Mr. Hurley was to draft the papers. Mr. Hurley was indisposed about ten or twelve days, so I secured the papers and took them to Mr. Rivers and Mr. Rivers drew up all the papers. (166)

Q. After the papers were prepared and executed who placed them in escrow, if you know?

A. After the papers were all executed I took them in to the bank. I took them to the escrow window, I believe it was Phyllis Gidden, and said you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the escrow window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book.

Mr. McNabb: You may take the witness." (Emphasis supplied.)

Where, within that testimony, can be found a "full, fair and complete disclosure of all the terms, conditions, covenants and provisions to be in said contract contained * * *"? All that appears to have been discussed was the amount of the monthly payments. Certainly nothing was said about the total purchase price or the amount of the down payment nor with reference to insurance or grace. In this connection, the purchase price stated in the contract subsequently placed in escrow was $27,500.00 (Exhibit "1" to Appellee Boussard's Answer, TR 42-48) and recited a down payment of $1,000.00. (TR 43). Yet Paragraph II of the First Affirmative Defense of the appellee Boussard (TR 39) recites that the purchase price was "the sum of $31,500.00, of which sum $4,000.00" was not set out in said contract. Whether the motives for

such concealment pertained to the tax affairs of the appellees Kaye or to the matter of the appellant Bank's mortgages does not appear. Appellant held four installment notes which were fully due and payable without invoking the acceleration clause contained in these notes. Is it reasonable to suppose that appellant would accept two hundred dollars a month together with interest on a liquidated indebtedness of $15,000.00 in lieu of foreclosure on a $31,500.00 property? Surely, under such circumstances, the appellant would want, and should have been entitled to, the moneys which were paid under the table. Yet the Court found erroneously, it is submitted, that the appellant was fully advised of the terms and conditions of the proposed sale prior to the execution of the formal contract documents and "did consent" thereto.

Interestingly enough, although the appellee Boussard was present at the trial of the cause (recitals to Findings of Fact and Conclusions of Law, TR 56), she failed to testify at all in her defense.

The foregoing argument is also applicable to the Trial Court's Finding of Fact No. XV (TR 62-63) insofar as there is any suggestion of an "assent" or "consent" to the contract placed in escrow.

B.

CONCLUSIONS OF LAW CONTRARY TO EVIDENCE.

1. Novation.

As a part of the first ground for its motion for a new trial, appellant maintained that the Conclusions of Law were contrary to the evidence.

Conclusion of Law No. 1 reads in full as follows: "The Plaintiff Bank of Fairbanks did waive its privilege to declare the promissory notes of the Defendants A. L. Kaye and Jean Kaye to be in default by its ratification of the provisions of the contract of purchase and sale, the subject of escrow No. 691, which said ratification and the acceptance of the payments by said Plaintiff Bank and the application of the proceeds thereof from and after the 9th day of November, 1951, did constitute a novation precluding the foreclosure of the mortgages held by the Bank securing the promissory notes of Defendants A. L. Kaye and Jean Kaye." (TR 65-66.)

A novation necessarily contemplates the extinguishment of an existing obligation and the substitution therefor of a new obligation with a new obligor. (39 *Am. Jur.* 258, Sec. 11.)

Moreover, "a mere modification of it (pre-existing obligation) will not do; anything remaining of the original obligation prevents novation." (39 *Am. Jur.* 269, Sec. 24.)

Apparently the Trial Court was of the opinion that the said Contract of Purchase and Sale and the acceptance of same into escrow by the appellant Bank operated to extinguish the mortgages and to substitute the contract purchaser, the appellee Boussard, for the note and mortgage obligors, the appellees Kaye. Only upon this theory could the Trial Court fail to give the appellant Bank relief by *in personam* judgment against the appellees Kaye which was prayed for.

In so holding, the Trial Court must have completely ignored the express terms of the Contract of Purchase and Sale as well as the admissions contained in the Answers of the Appellee Boussard and of the appellees Kaye.

Aside from the fact that the appellant Bank is not a party to the "substituted" obligation, the Contract of Purchase and Sale expressly recognizes the continued existence of the mortgage as valid obligations by the following recitation: "Whereas, Sellers own the real property hereinafter described and Buyer has agreed to purchase same on the terms and conditions hereinafter set forth, notwithstanding the fact that said property is subject to mortgages in favor of the Bank of Fairbanks securing four promissory notes, payable to said bank for an aggregate sum of Fifteen Thousand Dollars ($15,000.00), with interest from October 1, 1951, at Eight Percent (8%) per annum, it being understood and agreed that payments made under this contract will be applied to the satisfaction of said notes and mortgages prior to delivery of deed hereunder." (TR 43.)

Also, the appellees Kaye claimed only a waiver or estoppel to foreclose said mortgages and did not maintain that there was any extinguishment thereof. (Paragraph III, Affirmative Defense of appellees Kaye, TR 52.) Furthermore, the Answer of the appellee Boussard admits that her lien as contract purchaser is subordinate to the lien of said mortgages (appellee Boussard's admission of Paragraph VII of each of appellant's four causes of action—Paragraph IV of appellee Boussard's Answer, TR 38).

2. Waiver.

Conclusion of Law No. 1, above set out, suggests that there was a waiver of the appellant's right to foreclose its mortgages. An express waiver is, of course, the voluntary or intentional relinquishment of a known right. (56 *Am. Jur.,* Sec. 12, P. 113) and must be supported by a valuable consideration. (56 *Am. Jur.,* Sec. 16, P. 114.)

With reference to the latter factor, that of consideration, each of the notes secured by the subject mortgages were due and owing and payable in full. It is fundamental law that a promise to pay a past due indebtedness does not constitute a valuable consideration for the relinquishment of a right.

In *Stoneman Co. v. Briggs* (1933) 110 Fla., 104, 148 So. 556, it was held that an agreement on the part of a mortgagee to refrain from foreclosing his mortgage, and to waive all defaults so long as it received the rents, until the local real estate market should be on a sound financial basis, was no defense to foreclosure of the mortgage, since it lacked consideration and was indefinite as to time for performance.

In *Portland Mortgage Co. v. Horenstein* (1939) 162 Or. 243, 91 P. 2d 533, it was held that a mortgagee did not waive his right to foreclose the mortgage by making an agreement to extend the mortgage after it had already become due, if such extension agreement was not supported by a valid consideration. 148 *A.L.R.* 691.

Promises to forbear have been held to be ineffective where the only consideration was a payment of, or

a promise to pay, a part of that which the mortgagor was already bound to pay. *Jackson v. Fuller* (1936) 66 App. D.C. 239, 85 F. 2d 816 (Writ of Certiorari denied in (1936) 299 U.S. 608, 81 Fed. 448, 57 S. Ct. 236); *Brinson v. Herlong* (1935) 121 Fla. 505, 164 So. 137; *Byrd v. Equitable Life Assurance Soc.* (1938) 185 Ga. 628, 196 S.E. 63; *Brown v. Loewenback* (1935) 217 Wis. 379, 258 N.W. 379.

Thus, a mortgagee's promise not to foreclose based upon the mortgagor's promise to make payment on interest and taxes smaller than those provided in the mortgage was held in *Jackson v. Fuller,* supra, to be invalid for lack of consideration.

In *Brinson v. Herlong* (1935) 121 Fla. 505, 164 So. 137, it was held that where the only consideration for an extension agreement was the mortgagor's payment, after the due date of the obligation of the interest then due and a small amount of the principal, the agreement would not be binding on the mortgagee as there would be no valuable consideration for it, since the payment made was only a portion of that which the mortgagor was bound to pay in any event.

Likewise, a mortgagee's agreement, made when the mortgagor was in default to accept at stated times payment on account of past due interest was held in *Byrd v. Equitable Life Assur. Soc.* (1938) 185 Ga. 628, 196 S.E. 63, not to waive the right to insist on immediate payment or to foreclose the security, where such agreement was not a contract based on any consideration but was a mere indulgence by the

creditor and a mere act of grace on his part. 148 *A.L.R.* 692.

With reference to the first factor, there is no evidence of voluntary or intentional waiver. True, the vice president of the appellant Bank examined the contract of purchase and sale when it was placed in escrow (TR 227), but as previously noted the contract was expressly subject to the mortgages and was entered into "notwithstanding" the existence thereof. The examinaiton of the contract by said vice president and his purported statement to the alleged agent of the sellers: "I think we will go along" (TR 226) with the escrow, falls far short of the expression of any voluntary intention to forego the right of foreclosure, supported by any consideration, valid or otherwise.

Furthermore, a voluntary waiver cannot exist in vacuum. It is in the nature of a contract and presupposes the communication thereof to the persons to be benefited; yet there is a total lack of evidence that the alleged agent of the mortgagors ever told the mortgagors or the proposed buyer of his conversation with the vice president of the appellant Bank upon which turns the entire case of the appellees. The contract of sale was in fact executed by the parties before it was ever examined by an agent of the appellant and recites that $1,000.00 had already been paid thereon.

The appellee Boussard was present at the trial but did not testify at all and the only other testimony adduced by the appellees, that of the appellee A. L.

Kaye, was to the effect only, that he had made no payment to appellant Bank on said notes and mortgages since the execution of the said contract of purchase and sale. (TR 229.)

In view of the fact that there was no evidence of reliance by any of the appellees upon any statements made to the alleged agent of the appellees Kaye, no waiver could be implied.

> "A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby." (*Astrich v. German-American Ins. Co.,* 131 F. 13; *Black's Law Dictionary,* Third Edition, p. 1827.)

The doctrine of estoppel also must fall with the same lack of evidence of reliance by the appellees on any conduct or statement by any agent of the appellant Bank in inducing the execution of the contract of purchase and sale between the appellees Kaye and the appellee Boussard.

3. Judgment contrary to evidence.

As a part of the first ground for its motion for a new trial, appellant maintained that the judgment was contrary to the evidence. The same arguments

as have been stated above under the first assignment of error are equally applicable here and therefore will not be repeated.

In addition to those arguments, it must be noted that the pleadings on file in the Court below and the evidence adduced at the trial show that there was no dispute between the appellant Bank and the appellees Kaye as to the indebtedness due on the notes sued on. Regardless, then, whether or not the appellant Bank had waived any right to foreclose its several mortgages, certainly the Bank was entitled to a judgment *in personam* as prayed for against the appellees Kaye from the said indebtedness. If, indeed, it were conceded, for purposes of argument only, that under the circumstances the equity of the appellee Boussard should be protected, execution of said judgment against the subject property would necessarily be subject to that equity. The concurrent or cumulative remedies rule applies. (18 *Am. Jur.* 136, Sec. 13.)

C.

SECOND POINT RELIED ON.

The second statement in the statement of points relied on in this appeal, reads in full as follows: "That the judgment of the Trial Court is contrary to the law and the evidence. Said judgment appears at pages 78 to 79 of the original certified record." (The judgment appears at page 67 of the transcript of record herein.) The argument in support of the

second point relied upon on this appeal is the same as that above made with reference to the first point relied upon and therefore will not be repeated herein.

D.

THIRD POINT RELIED ON.

The third point upon which appellant relies on this appeal is stated in full as follows: "That the Trial Court erred in making the following numbered Findings of Fact: XIV, XV, XVIII and XIX in that such findings are contrary to the evidence. The Findings of Fact appear in the original certified record at Pages 68 to 72." (The Findings of Fact appear at pages 56 to 65 of the Transcript of Record herein.) Error with reference to Findings XVIII and XIX is hereby waived. Error with reference to Findings XIV and XV have heretofore been discussed and will not be repeated herein.

E.

FOURTH POINT RELIED ON.

The fourth point relied upon on this appeal reads in full as follows: "That the Trial Court erred in its Conclusions of Law in that the same are not based upon, nor do they follow from the Findings of Fact, and in that the same are contrary to the evidence adduced at the trial. Said Conclusions of Law appear at pages 76 and 77 of the original certi-

fied record." (The Conclusions of Law appear at pages 65 and 66 of the Transcript of Record herein.) Other than the arguments as hereinabove stated, under the first point relied upon on this appeal, the only additional comment required may be briefly stated as follows:

That the only finding of fact upon which the trial Court could base its judgment and its conclusions of law that a waiver or novation had been effected, would be set out in its findings numbered XIV and XV. (Tr. 62 and 63.) Assuming, for the purposes of argument only, that these findings are correct and have some basis in the evidence, they still do not justify nor support a conclusion that a novation or waiver was present. From the fact alone that a discussion was had between the alleged agent of the appellees Kaye and the vice-president of the appellant Bank of Fairbanks in which the proposed contract was discussed in detail and the further fact that the contract was placed in escrow and that the vice-president of said appellant Bank assented to its terms and conditions, no novation could result as has been previously pointed out since there was no extinguishment of the obligation of the mortgagors or any substitution of obligors. Further, as has been previously pointed out, no waiver or estoppel could be found by the Court as a conclusion of law to exist without a further finding of fact that the conversation of the vice-president of the appellant Bank with the alleged agent of appellees Kaye had been communicated to the appellees Kaye and the appellee Bous-

sard prior to their execution of the contract of purchase and sale and that they had in fact relied upon that conversation in their execution of said contract of purchase and sale.

CONCLUSION.

In conclusion, for the reasons hereinabove stated that there existed no novation, waiver—express or implied, or estoppel which would preclude the appellant Bank from foreclosing its several mortgages, or which would preclude a personal judgment against the appellees Kaye, it is respectfully submitted that the judgment of the trial Court be reversed and this cause remanded to the Court below with instructions to order a new trial.

Dated, Fairbanks, Alaska,
May 19, 1955.

Respectfully submitted,
MAURICE T. JOHNSON,
WILLIAM V. BOGGESS,
By MAURICE T. JOHNSON,
Attorneys for Appellant.

No. 14,653

IN THE

United States Court of Appeals

For the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE BOUSSARD,
Appellees.

APPELLEES' BRIEF.

GEORGE B. McNABB, JR.,
131 Lacey Street, Fairbanks, Alaska,
Attorney for Appellees.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,653

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APPELLEES' BRIEF.

STATEMENT OF THE CASE.

This action was instituted on April 23, 1952, by the filing of a complaint in the U. S. District Court for the District of Alaska, Fourth Division, in the cause entitled:

Bank of Fairbanks, an Alaskan banking corporation,

vs.

A. L. Kaye, Jean Kaye, and Josephine Boussard.

Appellant Bank, by its action, sought to foreclose four real and chattel mortgages on a single parcel of

real property, together with the contents, the mortgages having been executed by Appellees Kaye to secure four promissory notes, payment of each of which notes Appellant alleged to be in default.

Appellee Boussard was joined as a party Defendant by the allegation that: ". . . Josephine Boussard has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise . . ." (TR 17).

In separate answers, Appellees admitted the execution of the notes and mortgages as alleged.

In separate affirmative defenses, Appellees alleged the execution of a contract of Purchase and Sale, dated October 9, 1951, wherein Appellees Kaye agreed to sell and Appellee Boussard agreed the buy the mortgaged property subject to the lien of Appellant's mortgages in the then aggregate amount of $15,000. The Contract of Sale (TR 42) provided for the payment of the purchase price in monthly installments of $200 each, plus interest on the unpaid balance of the mortgage notes of 8% per annum, and interest at the rate of 6% per annum on the unpaid balance due from Boussard to Kaye, in the amount of $11,500.

Each Appellee alleged affirmatively that the aforementioned Contract of Sale was executed with the full knowledge and consent of Appellant, that the Contract and a Deed to the mortgaged property were delivered to the Appellant Bank with escrow instructions (TR 49), directing that each installment pay-

ment plus interest be applied to the liquidation of the debt evidenced by the promissory notes and secured by the mortgages sought to be foreclosed by Appellant's complaint.

Appellees, in their separate affirmative defenses alleged in substance that Appellant had agreed and consented to the provisions of the Contract of Sale; had waived foreclosure; had accepted the contract, Deed to the property and the instructions as the subject of an account in Appellant's Escrow Department; had accepted the installment payments and applied same to the liquidation of the mortgage notes as provided by the escrow instructions; that Appellees had relied on the representations and conduct of the agents of Appellant; and that Appellant should be, and was, estopped from claiming right to foreclose.

In reply, Appellant admitted the existence of the Contract of Sale between Appellees Kaye and Boussard, and admitted the acceptance of same into escrow. Appellant denied every other material allegation of each affirmative defense.

Thus, the issues were drawn.

ARGUMENT.

I.

This cause was heard by the Trial Court on the 16th day of August, 1954, or approximately twenty-eight months after the action was instituted. Ralph C. Bailey was called as the first and only witness for Appellant.

Bailey testified that he was then, and for some time had been, the Vice-President of the Appellant Bank of Fairbanks (TR 81).

He further testified, and there was admitted into evidence without objection certain promissory notes executed by the Appellees Kaye as follows:

Plaintiff's Exhibit	Dated	Amount	Payable
C	May 8, 1945	$10,000.00	$ 300 per month
E	Nov. 22, 1948	6,300.00	500 per month
G	Jan. 30, 1950	5,000.00	1,000—Dec. 1, 1950 4,000—Dec. 31, 1950
I	Feb. 3, 1951	5,000.00	Feb. 2, 1952

Mr. Bailey testified that as of August 16, 1954, the following amounts remained due and unpaid (TR 92-93):

	Amount Due	
Exhibit	Principal	Interest
C	$ 546.87	$ 4.49
E	4,100.00	33.71
G	5,000.00	41.11
I	1,150.62	9.45

Mr. Bailey testified further that between May 8, 1945, and June 3, 1949, the principal debt in the amount of $10,000.00 as evidenced by Plaintiff's Exhibit C, had been reduced to $900, and that no payment had been received thereon from June 3, 1949, until February 20, 1954 (TR 94).

Mr. Bailey testified that Plaintiff's Exhibit E (Note in the amount of $6,300, dated November 22, 1948, payable at the rate of $500 per month) was never paid

in accordance with its terms, and that Appellant had never received a $500 principal installment thereon (TR 95).

Bailey further testified that no payment had been received on Plaintiff's Exhibit G (Note in the amount of $5,000, dated January 30, 1950, payable $1,000, December 1st, 1950, and $4,000, December 31, 1950) (TR 97).

The testimony further disclosed that the first payment made on Plaintiff's Exhibit I (Note in the amount of $5,000, dated February 3, 1951, due February 2, 1952) was made on November 9, 1951, and that payments continued regularly on both principal and interest from that date (TR 98).

No payment applicable to principal was ever received on Plaintiff's Exhibit G ($5,000—due $1,000 on December 1st, 1950, and $4,000 December 31st, 1950) (TR 102).

The first payment was received by Appellant on Plaintiff's Exhibit I ($5,000, due February, 1952) on November 9, 1951 (TR 103). Mr. Bailey further testified as follows:

Q. Now let me ask you, Mr. Bailey, I think perhaps I did, let me ask you this, was there not on the 9th day of November, 1951, a total of six hundred forty dollars applied toward the retirement of one or all of these four obligations?

A. It would appear so.

Q. Well, is there any payment on any of these other four on the 9th day of November, other three, I'm sorry?

A. No, there isn't.

Q. Notes "G", "E" and "C", that is Exhibits "C", "G" and 'E" were very badly in default or certainly in default in both principal and interest on November 9, 1951, were they not?

A. That's right.

Mr. Bailey testified further that the Contract of Purchase and Sale between A. L. Kaye and Jean Kaye as sellers, and Josephine Boussard as Buyer, was received by the Appellant Bank as Escrow #691 on October 9, 1951, and that by reason thereof, the Bank received Six Hundred Forty Dollars on November 9, 1951, and that $606.67 was applied toward the reduction of principal, and $33.33 as interest of Plaintiff's Exhibit I (TR 112-113). The payment was made by "presumably Josephine Boussard" (TR 113).

On December 10, 1951, Appellant received $530.50,

On February 11, 1952, Appellant received $304.33, by reason of Escrow #691, and the entirety of the payments was applied toward the payment of Plaintiff's Exhibit I (TR 114).

The testimony concerning the payment on Escrow #691 as received by Appellant on the 10th of March, 1952, is quite enlightening and we quote:

Q. Now then, on March 10th of 1952, you received a payment of Three Hundred Fifty-Two Dollars, seventeen cents, did you not? (44)

A. My records do not indicate that amount of money.

Q. On the 10th day of March, 1952, the same note that we have been talking about, that is Exhibit "I" was credited against principal in the sum of Two Hundred Seventy Dollars, Thirty-Seven Cents, and with interest in the amount of Twenty-Four Dollars, Thirty Cents on the 10th day of March?

A. That's right.

Q. Your escrow records in this transaction 691 indicate I believe on the 10th day of March that a total of three hundred fifty-two dollars seventeen cents was paid?

A. That is correct.

Q. What happened to the other fifty-seven dollars, fifty cents—that amount, Mr. Bailey, if I may interrupt you, that represents interest on Mr. Kaye's equity in the property in the amount of eleven thousand five hundred dollars at the rate of six per cent per annum for one month, does it not?

A. That's right, but what I did with it, that is what I am trying to establish now. Evidently I have not enough material here to establish it.

Q. I will tell you.

A. All right.

Q. Two days later, and on the 12th day of March, 1952, you applied that money against principal on our Exhibit "I", 3-12-52?

A. That's right.

Q. There wasn't any payment made by Josephine Boussard (45) on that date at all, was there?

A. That's right now that you call it to my attention.

Q. So you applied on that date as you had on each previous occasion the interest of Mr. Kaye as it accelerated on his Eleven Thousand Five as is provided by the contract?

A. That's correct.

On April 8, Appellant received $350.84 under Escrow 691 and again applied same to Plaintiff's Exhibit I (TR 116).

On April 23, 1952, Appellant filed this action and on May 10, June 5 and July 11, 1952, it received $349.50, $348.17 and $346.84 respectively. These payments were held by the Appellant until July 21, 1952, at which time $957.82 was applied toward Plaintiff's Exhibit I, and no accounting has yet been made for the balance of $86.69 (TR 118-119).

On November 9, 1951, the day and date upon which Appellee Boussard made the initial installment payment as provided by Escrow #691, Appellees Kaye were indebted to the Appellant in the amount of $15,000 in principal, as represented by four promissory notes, each of which was past due, some since 1948 (TR 120).

Between November 9, 1951, and the trial of this cause, Josephine Boussard paid to Appellant $6,800, i.e., thirty-four installments of $200 each (TR 151) in addition to the sum of $2,749.54, which amount constituted the then accrued interest on Plaintiff's Exhibits C, E, G and I as of the date of payment of each of the aforementioned installments (TR 153).

Appellee Boussard had, in fact, paid to the Appellant, under the terms of the mentioned Contract of Sale, Appellant's Escrow #691, the sum of $11,459.87 between the date of the execution thereof and the date of the trial (TR 156).

The entirety of each payment made by Appellee Boussard between November 9, 1951, and July 9, 1952, in the gross sum of approximately $2,170 was applied directly against the indebtedness of Appellees Kaye by Appellant Bank (TR 189-190). In so applying the funds received by it, Appellant Bank followed the instructions and exercised the authority granted by the Escrow Instructions of Escrow #691 (TR 190).

All of the foregoing substantiates the opinion of Bailey, Vice-President of Appellant Bank, which was expressed as follows (TR 198-199):

Q. (By Mr. McNabb.) Her subsequent conduct in making the payments that she (Josephine Boussard) had been and was at that time an excellent credit risk, is that not true?

A. That is correct.

Q. And you knew that to be true at the time that she made the payments?

A. I felt that way about it, yes.

The testimony of Appellee's witness, Mr. Dworkin, to the effect that he had discussed the terms of the proposed Contract of Sale with Mr. Bailey in advance of the preparation and execution thereof, and that Bailey had, in fact, discussed the preparation of the

contract with an Attorney for the Appellees and had, during the conversation, relayed information which the Appellant Bank desired included in the formal instrument, was not refuted. The testimony of Mr. Bailey in that regard is as follows:

Q. (By Mr. McNabb.) Do you have any present recollection of whether you did talk with Mr. Dworkin concerning the preparation of the contract?

A. We could have. I couldn't say yes or no. I don't remember that part of it. It is hard to remember two and a half years ago.

Q. Do you have any recollection at this time as to whether you discussed with him the attorney who was to prepare the contract?

A. No, I don't remember that.

Q. Do you have any recollection of having called any attorney and given, relayed to any attorney the present unpaid balance of the indebtedness of Mr. Kaye to the Bank?

A. That could have been, but I don't remember.

Q. You could have done that?

A. I could have done it, sure.

Notice and knowledge of the Kaye/Boussard Contract of Sale was not denied by the Appellant Bank. Acquiescence therein and ratification thereof is evidenced by the testimony of Mr. Bailey as follows:

Q. Ralph, you feel like it but I want to know what the truth of the matter is?

A. The truth of the matter, George, we know the truth. Let's get down to basic facts. We know why

they* were put in the account. We know we should have taken them* right away. I (144) am wrong, admittedly. We should have taken them at each time. They were put in this account and went to that account to withdraw those funds to liquidate the note. They should have been there and they weren't.

At the conclusion of the trial, the Court announced: "Well, it is clear to me that the defendant, all of the defendants are entitled to prevail in this case. It is the law involved and which gives the defendant the right to prevail in this case is the law with reference to estoppel, waiver, contract, and a third party contract and novation. All of them we pursued end up by giving such a situation as arises in this case by giving the defendants in this case a right to a verdict in judgment. I hold for the defendants all the way through and against the plaintiff. The attorneys for the defendants are charged with the duty of drawing up findings and conclusions of law and decree. They will do so accordingly."

The first point upon which Appellant relies in seeking to establish error of the Trial Court, and thereby a reversal, is that the Court erred in its Findings of Fact No. XIV (TR 62), the pertinent portions of which Findings Appellant neglected to set out in full in its Brief, and which are as follows ". . . and did make unto said Vice-President of the Bank of Fairbanks a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions *to be*

*Contract payments.

in said contract contained, to which said terms, conditions, covenants and provisions said Vice-President did consent."

Said finding was amply justified by the testimony of Lazar Dworkin (TR 226). Mr. Dworkin testified as follows: ". . . He (Mr. Bailey, the Vice-President of Appellant Bank) called me up and told me he wasn't satisfied with the amount of the payments, so I called him again in the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted, I think we will go along with you, provided you designate the Bank of Fairbanks as the escrow agent and number two, that the payments be made directly to the Bank for the amount equivalent of the unpaid indebtedness (TR 227). He called Mr. Hurley while I was there and furnishd him all the figures in the respective amounts . . ." Mr. Dworkin further testified (TR 227): ". . . After the papers were all executed, I took them in to the Bank. I took them to the Escrow Window, I believe it was Phyllis Gidden, and said, you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the Escrow Window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book."

Under cross-examination by Mr. Johnson, Mr. Dworkin testified as follows (TR 228):

Q. (By Mr. Johnson.) Isn't it a fact that Mr. Bailey told you specifically that he could not accept the proposal that you had made under any consideration as a full payment of the moneys due on the Kaye notes?

A. That is not a fact, Mr. Johnson.

Mr. Johnson. That's all.

Had the testimony of Mr. Dworkin been untrue, Mr. Bailey being then in Court, could have and should have been recalled to rebut such testimony. Mr. Bailey was recalled, but did not rebut the testimony of Mr. Dworkin (TR 231-236). It should be specifically noted here that the conduct of the Bank from and after the receipt by it in escrow of the Contract of Purchase between A. L. Kaye, Jean Kaye and Josephine Boussard, sustains and confirms in every particular the testimony of Mr. Dworkin.

II.

Appellees have no particular quarrel with the law as enunciated by the Appellant in Section B, but find same either inapplicable to the case at bar, or inadequate in scope. Throughout the trial in the Court below, it was the contention of Appellees that the Appellant Bank had, by its conduct, waived its right to foreclose the mortgages executed by the Appellees Kaye; had, in fact, by its conduct, ratified the Contract of Sale, and was therefore estopped from securing a foreclosure.

In its Brief, Appellant states: ". . . An express waiver is, of course, the voluntary or intentional relinquishment of a known right (56 Am. Jur. Sec. 12, p. 113). To quote further from Am. Jur.:

> "Unless it is under seal, a waiver, to be operative, must be supported by an agreement founded on

a valuable consideration, or the conduct on which a waiver is predicated must be such as to preclude a party from insisting on performance of the contract or a forfeiture of the condition. However, in the latter case, it is not a requisite, as in the case of a technical estoppel, the prejudice result to the party in whose favor the waiver operates." (56 Am. Jur. Sec. 16, p. 116.)

We take the liberty of, again, quoting from Appellant's Brief and the case of *Astrich v. German-American Ins. Co. of N. Y.,* 131 F. 13:

"A Waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby."

We quote further from the opinion:

". . . It (waiver) is essentially a matter of intention though circumstances may sometimes be such that the real intention is immaterial and the question is whether a party is not estopped by conduct evidencing an intention upon which another has acted, to say what his true intention really was. In such cases, the ordinary and well understood doctrine of estoppel by conduct is applicable." (*Astrich v. German-American Ins. Co. of N. Y.,* CCA 3rd 1904, 131 F. 13, 20.)

We turn again to the testimony of Ralph Bailey, Vice-President of Appellant Bank (TR 151-152):

Q. (By Mr. McNabb.) So, have you now ascertained how many Two Hundred Dollar ($200.00) payments have been applied to this contract, Mr. Bailey, since it was placed in your Bank?

A. Well . . . Two Hundred Dollar ($200.00) payments; there is a total of Sixty Eight Hundred Dollars.

Q. Thirty-Four?

A. Thirty-Four payments.

Q. And they have been made each month from the time that the payment, or that contract was placed in escrow in your Bank?

A. That is correct.

In view of the foregoing testimony, how can it, in good conscience, be contended by the Appellant that:

> "the doctrine of estoppel also must fall with the same lack of evidence of reliance by the Appellees on any conduct or statement by any agent of the Appellant Bank in inducing the execution of the contract . . ."
>
> "The distinction between a contract intentionally assented to, or ratified in fact, and an estoppel to deny the validity of the contract, is very wide. In the former case, the party is bound because he intended to be; in the latter, he is bound notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treats him as legally bound." (31 C.J.S. 242, Estoppel, Sec. 60.)

"Prejudice is a necessary element of estoppel, but ratification requires no change of position or prejudice." (*Texas and Pacific C. & O. Co. v. Kirtley,* 288 S.W. 619.)

"However, notwithstanding their capability of being distinguished, ratification and estoppel are closely allied; the legal effect thereof is the same; the abstract difference between them may not render it improper to consolidate them, or to include one in the other, in the concrete consideration of the facts of a particular case; and the terms 'ratification' and 'estoppel in pais' are sometimes used in a way which seems to ignore any distinction between them." (31 C.J.S. 242, Estoppel, Sec. 60.) (See also: LRA 1915A 1024 and LRA 1918C 222.)

For manner of ratification by: (1) Acquiescence, (2) Recognition, (3) Payment of Interest or portion of principal, (4) Retention and use of property, see: LRA 1915 A 1033, et seq.

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled." (*Baker v. Humphrey,* 101 US 494, 17 L. ed. 1063; 21 C.J. 1240, Estoppel, Sec. 247.)

"A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel." (*N. Y. Life Ins. Co. v. Dumler,* CCA 5th 1922, 282 F. 969; 14 RCL 1180, 1190.)

"A waiver is comprehensively defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed." (*Division v. Klaess*, 20 N.E. 2d 744, 280 N.Y. 252; 31 C.J.S. 242, Estoppel, Sec. 61.)

"A waiver occurs, takes place, or exists when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something of which the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it; and when once made it cannot be recalled, expunged or revoked, nor can the right waived be reclaimed or regained by revoking the waiver . . . The doctrine of waiver is often difficult of application; and the question of whether waiver is present in any particular case must be decided upon the facts peculiar to that case." (31 C.J.S. 244, Estoppel, Sec. 61.)

"Acquiescence is a species of waiver." (*Frank v. Wilson & Co.*, 9 A 2d 82.)

"Waiver and estoppel or estoppel in pais are closely related; the line of demarcation between them is said to be very slight, since both partake of somewhat the same elements and ask essentially the same relief; and the terms are frequently and loosely used as convertible, especially where waivers implied, and estoppels arising, from conduct are involved, the dividing line being very shadowy in such cases and it being often a difficult question to determine just where the doc-

trine of implied waiver ends and that of estoppel begins." (31 C.J.S. 245, Sec. 61.)

"Waiver is voluntary relinquishment of known right, and may be either express or implied." (*Reynolds v. Travelers Ins. Co.,* 28 P 2d 310.)

" 'Implied waiver' may arise where one party has pursued such a course of conduct as to evidence intention to waive right, or where conduct is inconsistent with any other intention." (*Reynolds v. Travelers Ins. Co.,* 28 P 2d, 310.)

"Waiver by conduct has been recognized many times." (*Beaulaurier v. Washington State Hop Producers,* 111 P. 2d 559, and cases cited at p. 562.)

"Estoppel is preclusion by act or conduct from asserting right which might otherwise have existed, to detriment or prejudice of another who, in reliance on such act or conduct, has acted thereon." (*Reynolds v. Travelers Ins. Co.,* 28 P. 2d 310; *Vernon v. Equitable Life Assurance Society of US,* 129 P. 2d, 801; *Bennett v. Grays Harbor County,* 130 P. 2d 1041-1045; *Strand v. State,* 132 P. 2d 1011; *Tucker v. Brown,* 150 P. 2d, 604.)

" 'Waiver' is *unilateral* and arises by intentional relinquishment of right, or by neglect to insist upon it, while 'estoppel' presupposes some conduct or dealing with another by which other is induced to act or forbear to act." (*Reynolds v. Travelers Ins. Co.,* 28 P. 2d, 310.)

"It is not necessary that an equitable estoppel rest upon a consideration or agreement or legal obligation." (*Rothschild et al. v. Title Guarantee & Trust Co.,* 97 N.E. 879.)

"Waiver is essentially unilateral in its character, it results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it. It need not be founded upon a new agreement or be supported by a consideration, nor is it essential that it be based upon estoppel." (*Dockery v. Hanan,* 54 S.W. 2d, 1017-1022; *Order of Railway Conductors of America v. Quigley,* 83 S.W. 2d, 701-704.)

On page 14 of Appellant's Brief, it cites in support of its position in *Stoneman Co. v. Briggs* (1933), 110 Fla., 104, 148 So. 556. We quote from Appellant's Brief:

"It was held that an agreement on the part of a mortgagee to refrain from foreclosing his mortgage, and to waive all defaults so long as it received the rents* until the real estate market should be on a sound financial basis, was no defense to foreclosure of the mortgage, since it lacked consideration and was indefinite as to time for performance."

We quote from the Court's opinion:

"The first agreement for forbearance at most was only an agreement to waive defaults then existing and to forbear foreclosure as long as payments were made in accordance with that agreement. The record conclusively shows that the agreement was breached."

A careful perusal of Appellant's Brief leads to the inescapable conclusion that Appellant seeks as an

*Mortgagor assigned rentals and agreed to pay any deficit thereby guaranteeing $1,000 per month to mortgagee.

alternative to foreclosure a personal money judgment against Appellees A. L. Kaye and Jean Kaye; such position is untenable. Obviously, Appellant's action is for the foreclosure of its mortgages.

By the weight of authority, mortgage foreclosure is an action in rem or quasi in rem in those jurisdictions in which such action is considered as being both in rem and in personam, such foreclosure is considered as in rem for the purpose of foreclosing the mortgage lien and *in personam to obtain a personal judgment for the deficiency, if any.* (*In re Ganet Realty Corp.,* 9 F. Supp. 246 DC '35, aff. 83 F 2d, 945, cert. den. 57 SCt, 1217.)

> "Deficiency presupposes foreclosure and sale. A person purchasing subject to a mortgage and agreeing to pay the mortgage liability will not be heard to question the validity of such liability and by thus assuming payment he becomes primarily liable to the holders of the obligations thus assumed." (*City of Santa Cruz v. Wykes,* C.C.A. 9th 202 F., 357-373.)

> "Where one person enters into a contract with another for the express benefit of a third person, such third person may maintain an action for the breach, such a contract is not within the Statute of Frauds. The conveyance of the land is the consideration for the promise and the fact that the consideration moves from the Grantor is a matter of no moment. In such cases, the Grantee becomes the principal Debtor and the Mortgagor a surety." (*Evans v. Sperry,* 12 F. 2d, 438-439.)

> "The promise of a Mortgagor's Grantee to pay the Mortgagee does not relieve Mortgagor but renders him secondarily liable." (*First National*

Bank of Wellston v. Conway Road Estates Co., 94 F. 2d, 736, C.C.A. 8th, 1949.)

"In Texas, as generally elsewhere, the purchaser of property encumbered by a mortgage, who assumes to pay the mortgage as part of the consideration of his purchase as between himself and his Vendor becomes the principal Debtor and the Vendor is surety, the mortgagee may enforce the transaction for his own benefit." (*Pinckney v. Wylie,* C.C.A. 5th, 1936, 86 F. 2d, 541-542.)

"The purchase of land subject to a mortgage does not make the debt personal, but the debt will be charged on the land." (*McLearn v. Wallace,* 35 U.S. 625.)

CONCLUSION.

Appellees contend that the representations and conduct of the officer of Appellant Bank prior, as well as subsequent, to the execution of the Contract of Purchase and Sale between Appellees Kaye and Boussard, constitute a ratification of the provisions thereof.

Unquestionably Appellees relied upon the ratification. Appellees Kaye no longer sought a purchase for the mortgaged property as a means of liquidating their indebtedness and Appellee Boussard made payments at the Appellant Bank in strict compliance with the provisions of the contract.

The injury of Appellees could have been avoided by a simple statement from an agent of Appellant, prior to the execution of the Contract of Purchase and Sale, to the effect that "we intend to foreclose," or "we must be paid in full."

The conduct of Appellant in accepting the escrow and directly applying the payments made as a result thereof to the satisfaction of the mortgage debt is entirely inconsistent with any other honest intention than an intention to waive notice of default, demand for payment and foreclosure—subject, of course, to compliance with the provisions of the Contract of Purchase and Sale.

It is the contention and opinion of Appellees that the undisputed facts of this case constitute a prime and perfect example of the conduct incident to the establishment of waiver and estoppel. Obviously, the testimony was shocking to the conscience of the Trial Court. The Defendants prevailed.

By this appeal, Appellant seeks as an alternative, to reversal of the decision below, the allowance of a money judgment v. Appellees Kaye. This effort, it must be assumed, is motivated by a compelling desire that the Court *tacitly* approve Appellant's conduct which gave rise in this Court to the cause entitled: A. L. Kaye, Appellant, v. Bank of Fairbanks, Appellee, Cause #14,110.

Suffice it to say—if waiver and estoppel there be as regards one Appellee, waiver and estoppel there be to all.

Dated, Fairbanks, Alaska,
July 13, 1955.

Respectfully submitted,
GEORGE B. MCNABB, JR.,
Attorney for Appellees.

Service acknowledged by receipt of copy of the foregoing Brief this 13th day of July, 1955.

MAURICE T. JOHNSON,
Attorney for Appellant.

WILLIAM V. BOGGESS,
Attorney for Appellant.

No. 14654

United States
COURT OF APPEALS
for the Ninth Circuit

MILDRED E. McCAN,

Appellant,

vs.

THE FIRST NATIONAL BANK OF PORTLAND,
a national banking association,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Oregon.

PENDERGRASS, SPACKMAN & BULLIVANT,
R. R. BULLIVANT,
V. V. PENDERGRASS,
JACK L. HOFFMAN,
527 Pacific Bldg.,
Portland, Ore.
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-55

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Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE PLEADINGS AND FACTS

On November 9, 1953 a pre-trial order was entered in this case "concerning jurisdictional and related issues" (R. 14, 29). This order contained a statement of agreed facts and provided that "the making and entry of this pre-trial order shall, with respect to the issues hereinabove reserved for pre-trial, supersede the pleadings" (R. 29). The order was signed by the District Judge, and

approved in writing by plaintiff's attorney and defendant's attorney (R. 29).

Appellant's Opening Brief contains numerous allegations and innuendoes not supported by the pre-trial order and many not even set forth in the Complaint, which operate to place the plaintiff in a more sympathetic position than is warranted by the record.

Examples are plaintiff's statements on page 4 of her brief, "The Bank ignored letters sent by her to it and the personal visits of the social worker of the State Hospital" and "Repeated demands and requests were made for funds from the end of January 1952 to the end of May 1952 without acknowledgement by the Bank." Another example is the statement on page 3 of Appellant's Opening Brief that the decedent's daughter by an earlier marriage petitioned to have plaintiff declared incompetent and committed to the State Hospital "to reduce her father's expenses". Again, on page 12 of Appellant's Brief, appellant states that the employees of the trust department of a corporate trustee "have no personal relationship with the beneficiaries of the estates" to the end that "the wishes of a decedent are not carried out with respect to looking after the welfare of his loved ones".

Although Appellant's Brief, in the statement of facts and elsewhere, contains these and other allegations that are not only unsubstantiated by the record but immaterial to the issue before the Court, an analysis of each such statement would considerably increase the size of this brief without shedding additional light on the issue be-

fore the Court and we will therefore not comment further on the purported facts set forth in Appellant's Brief.

C. P. McCan died on December 19, 1951 at which time his widow, Mildred E. McCan, plaintiff and appellant herein, was a patient at the Oregon State Hospital at Salem, Oregon (R. 14, 15). The First National Bank of Portland, defendant and appellee herein, was appointed executor of the Last Will and Testament of C. P. McCan on January 9, 1952 by the Probate Court of Multnomah County (R. 15). On June 16, 1952 plaintiff filed a petition in the Probate Court for an order directing the executor to pay her $1,000.00 from the estate for her support from the date of death of the decedent to the date of said petition (R. 16). On June 23, 1952 the Probate Court entered an order directing the executor to pay forthwith to the plaintiff the sum of $500.00 as support money for the period prior to the filing of the Inventory and Appraisement (R. 17). This sum was paid by the defendant to the plaintiff on June 16, 1952 (R. 19).

On June 23, 1952 the Probate Court entered an order granting defendant until July 18, 1952 to file the Inventory and Appraisement in the McCan Estate and defendant filed the Inventory and Appraisement on July 18, 1952 (R. 17). On July 29, 1952 plaintiff petitioned the Probate Court for a widow's allowance continuing for a period of one year after the filing of the Inventory and Appraisement (R. 18). On July 31, 1952 the Probate Court entered an order granting plaintiff a widow's allowance consisting of monthly payments of $300 each

during the year following July 18, 1952 and this order was granted after a hearing at which plaintiff and her attorney appeared (R. 18, 19). Defendant paid the plaintiff $300 on July 18, 1952 and monthly thereafter for 12 months (R. 19). After being first paroled, plaintiff was discharged from the Oregon State Hospital on July 29, 1952 (R. 15).

On July 30, 1953 defendant filed its Final Account as executor of the McCan Estate with the Multnomah County Probate Court, setting forth its conduct of which plaintiff complains in this proceding, and requesting that the Probate Court approve the account and discharge the defendant, as executor, from all liability to any person including the plaintiff by reason of any matter involved in the administration of the estate (R. 19). Plaintiff filed objections to the account (R. 20) and the hearing on the objections is now pending.

Plaintiff alleges that negligence of defendant proximately caused plaintiff's continued confinement in the Oregon State Hospital from February 1, 1952 to June 2, 1952, subjecting her to suffering for which she seeks damages. Plaintiff alleges that defendant was negligent in failing to file an Inventory and Appraisement prior to July 18, 1952, in withholding information from her and others, and in failing to provide plaintiff with reasonable support moneys from the estate of her deceased husband during the period from February 1, 1952 until June 17, 1952.

The District Court considered only the jurisdictional question and dismissed this action on the ground that the

Court was without jurisdiction of the subject matter. (See Opinion of the lower court, beginning on p. 30 of the Record and Judgment beginning on p. 37 of the Record).

STATEMENT OF THE CASE

The issue before this Court is whether the United States District Court has jurisdiction to determine certain questions material to plaintiff's alleged right to damages in this case.

Plaintiff has attempted to allege facts constituting a cause of action for damages arising out of defendant's alleged negligent administration of the Estate of C. P. McCan. A judgment for the plaintiff on the merits of this case would determine, among other things, that defendant, as Executor, owed plaintiff a duty to exercise a degree of care in the administration of the Estate of C. P. McCan, and that the conduct of defendant constituted a violation of this duty of care.

The particular duties which plaintiff contends existed, and which plaintiff alleges defendant violated, are as follows:

(1) Defendant, in its capactity as Executor of the Last Will and Testament of C. P. McCan, deceased, should have filed the Inventory and Appraisement of the estate with the Probate Court on some date earlier than July 18, 1952, the date on which the Executor filed the Inventory and Appraisement with the Probate Court;

(2) Defendant, in its capacity as such Executor, should have made information of some sort concerning the estate available to plaintiff, her representatives and representatives of the State of Oregon, between February 1, 1952 and June 6, 1952;

(3) Defendant, in its capacity as such Executor, should have given funds from the estate to the plaintiff as a widow's allowance on some date prior to June 16, 1952, the date on which defendant commenced payment of a widow's allowance to plaintiff.

It is the contention of the defendant that only the Probate Court of Multnomah County has jurisdiction to determine whether such duties existed, and whether defendant's conduct as Executor violated any such duties as might have existed. If the United States District Court has no jurisdiction to determine these questions, then that Court has no jurisdiction over the subject matter of this action since a favorable determination of these questions is essential to plaintiff's right to any recovery.

Actually, all damages claimed flow from the failure to receive a widow's allowance in February 1952, rather than in June 1952. The alleged delay in filing the inventory and the alleged failure to give an undisclosed type of information are merely collateral to the claimed delay in receiving the allowance. Filing the inventory or giving information would not have freed the plaintiff from the hospital. Under her own allegations, her release was held up solely because of the failure to have means of support then available. Moreover, the time for filing the inventory and the giving of information by an executor are equally matters for the probate court.

As noted above, the District Court considered only the jurisdictional question, and dismissed the action solely because the court was without jurisdiction of the subject matter. In spite of this, appellant devotes most of her brief to advocating that her Complaint states a cause of action. If ever a similar Complaint is filed in a court having jurisdiction of the subject matter, it will be our contention that the Complaint should be dismissed for failure to state a cause of action. However, the arguments and authorities on the cause of action question are different from the arguments and authorities on the jurisdictional question, and the defendant will not burden this brief by arguing a question not considered by the lower court.

To illustrate the point that the two questions, although related, require separate consideration, we will mention only a few of the many legal issues raised by the cause of action question, but not directly raised by the jurisdictional question:

(a) Whether an executor owes anyone, other than the Probate Court, a legal duty to carry out the requirements of the Probate Code;

(b) Whether defendant's alleged conduct violated the Probate Code or was in any way improper;

(c) Whether the Probate Court orders under which defendant acted bar plaintiff by the doctrine of res judicata;

(d) Whether plaintiff's failure to file timely petitions in the Probate Court, seeking orders directing the executor to do as plaintiff wished, bars her now;

(e) Whether proper care and treatment in a mental hospital, not accompanied by physical injury, can constitute compensable injury in a negligence action.

The lower court properly restricted itself to the jurisdictional question, since by holding that it was without jurisdiction over the subject matter, it determined that it had no jurisdiction to consider whether a cause of action was stated.

EXPLANATION OF STATUTORY REFERENCES

Many Oregon statutes are referred to in this brief. At the time this action was filed, the Oregon Compiled Laws Annotated (cited as OCLA) was the current compilation of Oregon statutes. On January 1, 1954, a new code, Oregon Revised Statutes (cited as ORS), became effective. While the current statutes cited herein were not changed in any material particular, the Oregon Revised Statutes contains some slight changes in wording and arrangement, and omits statutes no longer in effect which we have cited for historical background. Since this action involves the law as it was prior to January 1, 1954, we have cited and quoted from the statutes as found in OCLA, but have also inserted references to the similar ORS section where appropriate. The material portion of each Oregon statute cited herein is set forth either immediately after the citation or in the Appendix.

ARGUMENT

Only a court with probate jurisdiction can determine a question intimately connected with the administration of an estate, and neither the United States District Court nor the general courts of Oregon have probate jurisdiction.

The trial judge succinctly stated the basis for the court's rejection of jurisdiction when he said:

> "The acts charged against the administrator here are all inextricably woven into the administration of the estate." (R. 33), and
>
> "If the action of the Probate Court can be controlled in administration of an estate by such interference (referring to the trial of appellant's action in federal court), its exclusive jurisdiction over this subject matter has been dissipated." (R. 34).

Appellant's brief not only pointedly ignores this logic but fails to cite a single authority to dispute the view that the subject matter of her claim is exclusively within the jurisdiction of the Oregon probate courts. It even refers (Appellant's Brief, p. 9), without demonstrating their inapplicability, to two of the Oregon decisions, *National Surety Corporation v. McArthur,* 174 Ore. 376, 149 P. (2d) 328 (1944), and *Cass v. Harder,* 153 Ore. 637, 58 P. (2d) 618 (1936), cited by the trial judge, which clearly sustain this exclusive jurisdiction of the probate court in matters of the kind here at issue.

As the trial judge observed (R. 34), "interference by the federal courts in these purely domestic affairs would be intolerable" for "the Tenth Amendment protects the exclusive jurisdiction of the state over such matters."

Originally, in Oregon, exclusive jurisdiction over probate matters was vested in the county courts. OCLA 13-501. In Multnomah County this exclusive probate jurisdiction was transferred to the Circuit Court. OCLA 13-206. However, probate jurisdiction is exercised by the Department of Probate of the Circuit Court for Multnomah County, which Department when so acting does not possess general jurisdiction, and other departments of the Circuit Court exercise general jurisdiction but when exercising such jurisdiction do not possess probate jurisdiction. *Arnold v. Arnold* 193 Ore. 490, 237 P. (2d) 963, 239 P. (2d) 595 (1951). For the sake of convenience this brief will follow the example of the opinion in the Arnold case, and refer to the "Probate Court of Multnomah County", rather than the more correct but also more cumbersome "Department of Probate of the Circuit Court of the State of Oregon for the County of Multnomah".

In Oregon, probate jurisdiction includes the authority and duty to control and supervise the conduct of executors.

> OCLA 13-501. "The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is:
>
> * * *
>
> (3) To direct and control the conduct, and settle the accounts of executors, administrators and guardians;
>
> * * *."
>
> OCLA 19-226. "* * *; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end

that he faithfully and diligently perform the duties of his trust according to law."

Probate jurisdiction, consisting of immediate and continued supervision and control of the conduct of personal representatives and ascertainment of probate rights and duties, by a court, as practiced in this country, was not known to the English common law judicial system. The practice is peculiar to the states of this country. Our probate courts administer probate rights and duties which are, in the main, of purely local, statutory origin.

In England, on the other hand, the equity courts did entertain suits involving a personal representative where his acts as executor might be subjected to judicial scrutiny and relief, but there was no court which exercised the initial, direct, supervisory control of our probate courts.

Woerner, American Law of Administration, Sections 141, 156.

Woerner, supra, in Sec. 156 makes the following statement:

"The general tendency is to vest exclusive original jurisdiction over executors * * * in Probate courts, arming them with ample powers both in the extent of their jurisdiction and their mode of procedure, for the accomplishment of their purposes which could not be obtained in the English testamentary courts and rendered necessary the interference of equity courts."

Plaintiff's entire argument on the jurisdictional question rests on the rule that where diversity of citizenship

and the jurisdictional amount are present, the Federal District Court has concurrent jurisdiction with the general trial courts of the state in which the federal court is sitting (Appellant's Brief, pp. 6, 7). Plaintiff, however, does not cite a single Oregon case in which a court of general jurisdiction took jurisdiction to determine a purely probate issue or attempted to review the administration of a decedent's estate in order to pass upon the propriety of a personal representative's conduct.

Plaintiff virtually concedes that the general courts of Oregon do not have jurisdiction over such matters when plaintiff states (Appellant's Brief, p. 9): "The Supreme Court of Oregon has refused to concede general court jurisdiction of matters within the exclusive jurisdiction of the probate court." The two Oregon cases, which we will discuss subsequently, cited by plaintiff following this statement clearly demonstrate that Oregon state courts of general jurisdiction do *not* have jurisdiction to decide purely probate or administrative questions, and the conclusion necessarily follows that the Federal District Court for the District of Oregon likewise does not have jurisdiction.

As stated above, Oregon is one of the many states that vested *exclusive* probate jurisdiction in its probate courts. Because of the supervisory control over executors and the exclusive probate jurisdiction exercised by Oregon probate courts, Oregon courts of general jurisdiction have never entertained proceedings involving determination of matters intimately connected with the administration of estates.

In *Winkle v. Winkle,* 8 Ore. 194 (1879), a suit was brought in a court of general jurisdiction to declare a constructive trust as to a certain personal property that had been set apart for the widow by the Probate Court as exempt property. Plaintiff alleged that the widow entered into an ante-nuptial agreement to share the property with the heirs. The Oregon Supreme Court held that a court of equity had no jurisdiction over the subject matter of this action because it involved matters that fell within the exclusive jurisdiction of the probate court.

In *Cass v. Harder* 153 Ore. 637, 58 P. (2d) 618 (1936), devisees brought a suit in a court of general jurisdiction seeking among other things to charge an executor with interest for his alleged negligent delay in the settlement of the estate. The Court dismissed the suit pointing out that all matters sought to be litigated could have been, and many of them were, presented in the probate court.

National Surety Corp. v. McArthur 174 Ore. 376, 149 P. (2d) 328 (1944), was an action in a court of general jurisdiction against a former administrator brought by his surety to recover losses sustained by the estate through the alleged negligence of the defendant in his administration. The court held that the remedy could be pursued "only in the probate court". (174 Ore. at 380, 149 P. (2d) at 329).

Matters pertaining to probate and the administration of estates are matters of local competence, and for this reason it has become firmly established that the fed-

eral courts have no jurisdiction over matters which are probate or administrative in nature. The exclusive jurisdiction of the states is protected by the Tenth Amendment to the United States Constitution. Federal courts do not interfere in probate and administrative matters for the same general reasons that federal courts do not interfere in other local matters, such as divorce, filiation proceedings, care of the insane and mandamus of state officers.

Woerner in his American Law of Administration, Vol. I, Sec. 156a, p. 542, states as follows:

> "But there is no federal law of probate or of the administration of estates, * * *. And, as established by the Supreme Court of the United States in an exhaustive opinion delivered by Justice Brewer, the Federal Courts have no original jurisdiction with respect to the administration of estates of deceased persons; they cannot draw unto themselves by reason of any of the powers enumerated, the res or administration itself; nor make any decree looking to the mere administration of the estate. * * * These courts properly recognize the importance of fully according to the convenient forum of the State Probate Courts, jurisdiction over purely probate administrative proceedings, where for more than a century such jurisdiction has been understood to belong. The rights of the parties as given or restricted by the probate jurisdiction of the State Courts are fully recognized."

In *Tussing v. Central Trust Company* (DC ED Mich. SD), 34 F. (2d) 312 (1929), the Court said at 34 F. (2d) 315:

> "It is a settled rule of law in the federal court that, when a probate court of a state, in the exercise of its exclusive jurisdiction which it has acquired over

> assets of an estate, is engaged in the administration of such assets and legal proceedings pending before it, a federal court will not disturb or interfere with the administration of such estate or the control of such assets by such probate court or by its officers acting in their official capacity."

The following statement is made in Anno. 158 A.L.R. 14:

> "Generally speaking, it is well settled that even though there exists the requisite diversity of citizenship and amount in controversy, a Federal court has no jurisdiction, either original or upon removal of a cause from a state court, of matters strictly or purely probate or administrative in nature; and this is so not primarily because the court whose aid is invoked is a national court, but because such matters, being statutory, and involving proceedings in rem, do not belong to the general equity jurisdiction under long-established chancery practice."

There have been many cases in which it has been held that a federal court lacked jurisdiction to determine a question closely connected with the administration of an estate.

Putnam v. Citizens' National Trust & Savings Bank (CCA 9), 77 F. (2d) 58 (1935), was a suit brought against the executor by a daughter of the decedent. Plaintiff sought among other things to require the executor to pay damages to the estate based upon the fact that the executor had paid a widow's allowance for an unreasonable length of time and had otherwise negligently administered the estate. The Circuit Court of Appeals affirmed a decree of dismissal on the basis of lack of jurisdiction.

Another case in which a plaintiff unsuccessfully attempted to secure an adjudication from a federal court concerning a widow's allowance was *Central National Bank v. Fitzgerald* (CC D Neb.), 94 Fed. 16 (1899). In this case a creditor of the estate brought suit in a federal court of general jurisdiction, alleging, among other things, that the family allowances awarded by the probate court were too large. In ruling on a demurrer to the complaint the court made the following statements concerning the family allowances at 94 Fed. 18:

> "It is open to complainant and the other creditors to contest these allowances in the probate court, and, if aggrieved by its judgment, a remedy is open by appeal to the Supreme Court of Nebraska. With respect to allowances of this character, in the absence of proof showing that the probate court was fraudulently imposed upon, or the creditors were fraudulently prevented from contesting the same in the probate court, a court of equity will not attempt to reexamine the allowances made by the probate court."

Carstensen v. United States Fidelity & Guaranty Co. (CCA 9), 27 F. (2d) 11 (1928), was an action brought by a creditor of the estate in a court of general jurisdiction against the executor's bondsman. Plaintiff alleged that his claim against the estate was unpaid, that all other claims of the same class had been paid, that the estate was being consumed by taxes, allowances and fees and was liable to become insolvent through maladministration, and that the executor had failed to file his report. Plaintiff sought to recover the amount of his claim plus interest. The lower court dismissed the complaint for lack of jurisdiction over the subject matter and the

judgment of the lower court was affirmed on appeal. At page 12 this court made the following statement:

> "Matters of strict probate are not within the jurisdiction of the federal courts."

In *Sutton v. English* 246 U.S. 199, 38 S. Ct. 254, 62 L. Ed. 664 (1918), the heirs of a decedent brought suit in a federal court of general jurisdiction. Plaintiffs sought to have the decedent's real property partitioned among themselves on the ground that decedent's Will, which disinherited them, was invalid because of undue influence and incompetence. The Supreme Court considered the case solely on the jurisdictional issue, and held that since the annulment of the Will was essential to plaintiff's right to any relief, and since the federal court had no jurisdiction to annul the Will, the court had no jurisdiction over the subject matter of this suit. At 246 U.S. 205, 38 S. Ct. 256, 62 L. Ed. 668, the Court made the following statement:

> "By a series of decisions in this Court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the Federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of the courts of the United States."

Davis v. Davis (CC D Mont.), 89 Fed. 532 (1898), was likewise a case in a federal court of general jurisdiction. Plaintiff had contracted with his brother that

plaintiff, in return for the performance of certain services, would receive one-half of the brother's share of the father's estate. The father's will was admitted to probate and the probate court's order admitting the will indicated that distribution would not be made in accordance with the plaintiff's contract. Plaintiff alleged that the total claims against his father's estate were less than $50,000, and he sought a decree providing among other things that he was entitled to one-half of his brother's legacy, and directing the administrator to account and to retain his commissions plus $50,000 to pay claims and distribute the remainder of the estate. The court held that plaintiff had stated a good cause of action in equity in the nature of a suit for specific performance of a contract, and held that plaintiff was entitled to relief of some sort on the contract, but at p. 539 the court made the following statement:

> "The prayer is too broad and asks for relief which this Court has no jurisdiction to give. To ascertain the amount of unpaid claims against the estate of a deceased person, and to determine when such an estate is in a condition for distribution, are matters within the jurisdiction of the courts of the state exercising probate jurisdiction, and concerning which this court has no authority to interfere."

Johnson v. Ford (CC D Ore.), 109 Fed. 501 (1901), was a suit brought against the executor of an Oregon estate, and others. Plaintiff alleged that the other defendants, in collusion with the defendant-executor, converted property of the estate, that the executor filed a false inventory with the Probate Court, and that the executor refuses to take any steps to recover the prop-

erty of the estate from the other defendants. Defendant-executor demurred on the basis of lack of jurisdiction, and the Court sustained the demurrer. The Court held that an Oregon Probate Court has exclusive jurisdiction to administer decedent's estates, "and to determine all questions necessary to such administration". (p. 502). Also at p. 502 the Court stated:

> "If there is property belonging to the estate that the executor has not included in his inventory; if the executor is remiss in his duty, or is guilty of fraudulent practices affecting the estate,--these are matters exclusively within the cognizance of the court of probate, whose jurisdiction is adequate to grant relief by the summary process of removal."

Nelson v. Miller (CA 9), 201 F. (2d) 277 (1952), was a case in which a decedent owned property in California and Florida, and probate proceeding were initiated in each state, based on the theory that the decedent was a domiciliary of that particular state when he died. This was an action brought by the Florida executor against the California executor to obtain a determination that the decedent was domiciled in Florida and to obtain the property administered by the California executor. This court held that the probate court of each state had the authority to administer the assets in that state and to make its own finding concerning the domicile of the decedent, and the federal court had no jurisdiction either to determine the domicile or to disturb the possession of the decedent's property.

Reynolds v. Remick (DC D Mass.), 82 F. Supp. 281 (1949), was a suit by the beneficiary of a testamentary trust against one of the trustees. Under the law of Mass-

achusetts a trustee of a testamentary trust is supervised by and must account to the Probate Court. Plaintiff alleged that defendant wastefully expended trust money for his own personal benefit and prayed that the defendant account for his personal profits derived from his breach of trust, and for other relief. The complaint was dismissed for lack of jurisdiction, and at page 283 of 82 F. Supp. the court made the following statement, referring to the issue raised by plaintiff's allegations of improper administration:

> "It turns on subtle problems of fiduciary discretion and administration which are even now about to be considered by the state court which gave its sanction to the appointment of the trustee and which is established for the very purpose of holding to strict account those who operate a res within the exclusive control of that court."

At p. 282 the Court made the following statement:

> "The complaint must be dismissed because it presents charges relating exclusively to that type of administration of and accounting in a probate estate with which federal courts do not intermeddle."

Foster v. Carlin (CA 4), 200 F. (2d) 943 (1952), was an action brought for a determination that an alleged trust was fraudulent in its inception and void, that a settlement agreement was vitiated by fraud, that the deceased died intestate as the owner of shares of stock of a corporation, and for the appointment of a receiver for the corporation. The Court of Appeals held that the District Court had jurisdiction over all matters involved except a determination as to whether the deceased died intestate.

In *Rice v. Sayers* (CA 10), 198 F. (2d) 724 (1952), cert. den. 73 S. Ct. 172, 344 U.S. 877, 97 L. Ed. 680, decedent left his entire estate in testamentary trusts for several educational institutions. This was a suit by his heirs in federal court to have the trusts declared void. The estate was probated in the State of Kansas. Under Kansas law the probate court had exclusive jurisdiction over a suit to contest a will. The court held that in effect this was a suit to contest a will and the district court had no jurisdiction over the subject matter.

Kittredge v. Stevens (CCA 1), 126 F. (2d) 263, cert. den. 317 U.S. 642, 63 S. Ct. 34, 87 L. Ed. 517 (1942), was an action against an administrator, a trustee and a guardian, and the Court of Appeals construed the complaint as requesting the court (1) to hold the defendants personally liable to the plaintiff because they withheld property rightfully belonging to the plaintiff, and to her predecessor; (2) to order the defendants to turn over to the plaintiff property which they received in their fiduciary capacities; and (3) to order an accounting with respect to both aspects of the relief requested.

The court stated at p. 267:

> "If the issues presented by the complainant involve a consideration of the actual handling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction."

The court then held that such issues were presented by this case, and therefore there was no jurisdiction.

Princess Lida v. Thompson, 305 U.S. 456, 59 S. Ct. 275, 83 L. Ed. 285 (1938), arose in Pennsylvania, and

under Pennsylvania law after a trustee filed an accounting with the Common Pleas Court the court acquired jurisdiction over the trustee somewhat similar to the relationship of a probate court and an executor, in that the court had supervisory control over the administration of the estate, and had power to hear objections to the account and to surcharge the trustee. The Supreme Court held that the Federal District Court had no jurisdiction over the matter pending therein because the contentions of the plaintiff were solely as to the administration and restoration of the corpus of the trust, and the Pennsylvania state court had exclusive jurisdiction over those matters.

In *Feist v. Fidelity Union Trust Company* (DC D N.J.), 29 F. Supp. 51 (1939), plaintiff and defendant were co-executors and co-trustees under the will of the plaintiff's deceased husband. The will had been admitted to probate and an account had been filed in the probate court of New Jersey. The complaint alleged improper and unlawful administration of the estate by the defendant trust company resulting in enormous losses, and sought to surcharge the defendant and remove it as executor and trustee. The court dismissed the complaint for lack of jurisdiction.

Numerous other cases could be cited for the proposition that federal courts have no jurisdiction over matters strictly and purely probate or administrative in nature.

Anno. 158 A.L.R. 12.
54 Am. Jur. U.S. Court, Sec. 36.

There are no real exceptions to this rule.

Appellant quotes from the foregoing A.L.R. annotation but fails to point to any authorities or language appearing in it supporting the view that all material portions of its case are in the exclusive jurisdiction of the Oregon probate court, and fails to make an accurate analysis of the decisions appearing in it.

As appears from the A.L.R. annotation, federal courts do have the right to adjudicate the amount of a creditor's claim, the status of one claiming to be a distributee, and whether a probate order or decree may be set aside for extrinsic fraud in the probate proceedings.

Gillespie v. Schram (CCA 6), 108 F. (2d) 39 (1939).
Blacker v. Thatcher (CCA 9), 145 F. (2d) 255 (1944).
Smith v. Worthington (CCA 8), 53 Fed. 977 (1893).

However, none of these instances involves a decision as to the establishment or control of the duties of an executor by the local Probate Court which appoints him and of which he is an officer. The three categories above mentioned do not directly deal with an executor's duties as such. In the case of a creditor or a distributee whose status may be established by decree of a federal court, the federal court does not enter the administrative field occupied by the local probate court and determine how or when such claims shall be paid. It does not decide how the funds shall be raised, what assets shall be sold, the priority of various claims, or the *time* and *manner* of payment. These matters all involve too direct an in-

terference in a purely local administrative field. In granting relief from a probate order procured by extrinsic fraud, the federal court does not concern itself with whether the plaintiff could or should have had a different probate order, but only whether some fraud was practiced upon the Probate Court itself.

Of course, if a state gives a remedy, not theretofore existing, by civil action in its courts of general jurisdiction, such remedy may also be had in the federal court sitting in that state. In accordance with this rule, a federal court, which would otherwise have no jurisdiction over a suit affecting probate or other matters of administration, has jurisdiction when by the law of the state where the federal court is sitting a court of general jurisdiction has jurisdiction of an independent suit inter partes involving a like subject matter. Anno. 158 A.L.R. 17.

The *only* federal case cited by the plaintiff in which the court reviewed the manner in which an estate was administered in order to determine whether it was administered negligently, as plaintiff urges the District Court to do in this case, was a case falling squarely under this rule: *Ross v. Beacham* (DC WD S.C.), 33 F. Supp. 3 (1940).

In that case plaintiff alleged negligent administration of the estate including a 10 year failure to file an annual account. The defendant-administrator did not raise the jurisdictional issue but denied the allegations of negligence and pleaded a judgment in bar. His reason for failing to raise the jurisdictional issue becomes obvious

at p. 8 of 33 F. Supp., where Section 9012, South Carolina Code 1932, is quoted in part. That statute required an administrator to file an annual account and provided that if he failed to do so he would " be liable to be sued for damages by any person or persons interested in the estate". No such provision can be found in the Oregon law.

A further investigation of the law of South Carolina reveals another basic difference between the law of that state and the law of Oregon. In South Carolina the Probate Court does *not* have exclusive jurisdiction over probate matters; rather the Court of Common Pleas, a court of general jurisdiction, (South Caro. Const. '95, Art. V, Sec. 15) has concurrent jurisdiction with the Probate Courts. *Beatty v. National Surety Co.* 132 S.C. 45, 128 S.E. 40, 43 (1928).

Since in Oregon the Probate Courts have *exclusive* jurisdiction over probate matters, and Oregon state courts of general jurisdiction do *not* have jurisdiction over matters strictly probate or administrative in nature, the *Ross* case is distinguishable and does not support plaintiff's contention

In the instant case, the plaintiff, as a foundation of her case, asked the District Court to determine that widow's support money, undetermined in amount, should have been paid at some date and in some amount never passed on by the Probate Court, out of funds or assets subject to the control of the local court. It is an attempt to have a federal court assume probate jurisdiction, to determine ex post facto what the proper action for the

executor was, when the executor himself was directly responsible to the Probate Court.

Bancroft's Probate Practice (2d Edition) Sec. 337 contains the following statement:

> "The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction, it being the duty of the executor or administrator to take possession of the property of the estate and preserve it for the benefit of the heirs and creditors; but the executor or administrator possesses and handles the property subject to the control of the probate court. Consequently, the probate court is vested with the power to supervise the conduct of the executors or administrators; and if they neglect to procure authorization to perform acts, that court is the tribunal to approve or disapprove."

The Oregon Supreme Court stated in *Re Workman's Estate,* 156 Ore. 333, 390, 68 P. (2d) 479, 481 (1937):

> "From in re Wilson's Estate, 85 Ore. 604 (167 P. 580), we quote:
>
> " 'In the administration of an estate, of which the County Court has exclusive jurisdiction in the first instance, it is necessary for that court to direct the executors how to proceed, to whom the property in their hands shall be given, and what each shall receive. It has full power and jurisdiction to respond to such petition by an appropriate decree. That is one of its functions and duties.'
>
> "The following is taken from Bancroft's Practice, Sec. 336:
>
> " 'An administrator, duly appointed, is thus an officer of the court, subject to its orders, answerable to the court in contempt proceedings or liable to removal from office for refusal to obey the order of the court, and is entitled to the protection of the

court in carrying out its orders. Except under the nonintervention will statutes existing in a few states, the policy of the law is that the court have supervisory control of all the acts and transactions of either an executor or an administrator. Indeed probate courts are vested with very extensive discretionary power over the conduct of these officers, and exercise of such discretion will not be interfered with on appeal unless plainly required by some principle of law. An executor or administrator thus holds the estate substantially as a stakeholder, for delivery in accordance with the court's order of distribution. The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction. The executor or administrator derives his power from the order of the court issuing his letters, and acts simply under its control.'

"From the above it will be observed that the representative is at all times subject to the superintending power of the probate judge."

The principle set forth in *Re Workman's Estate* 156 Ore. 333, 65 P. (2d) 1395, 68 P. (2d) 479 (1937), and by Bancroft as quoted above was applied by the United States District Court for the District of Oregon in the case of *Crocker v. Kay* (DC D Ore.), 2 F. Supp. 162 (1932); affirmed 62 F. (2d) 391; cert. den. 288 U.S. 615, 53 S. Ct. 506, 77 L. Ed. 988. In that case an order of the Referee in Bankruptcy directing an administratrix to pay over certain moneys to the Trustee was vacated on the basis of lack of jurisdiction.

On p. 164 the Court made the following statement:

"A person is not entitled to become administratrix as of right, but only subject to the order of a Court. By appointment the administratrix becomes the arm of the court. Her possession is the possession of the

> court, for she acts under its authority and is guided by its orders. In every sense the administratrix is the officer of a court. See Byers v. McAuley, 149 U.S. 608, 13 S. Ct. 906, 37 L. Ed. 867.
>
> "It would indeed be the height of injustice, therefore, to attempt to punish personally, by contempt, an administratrix, for failure to turn over to the trustee money to which the latter believes he is entitled. This officer cannot act without the authority of the county judge. It would be more to the point to treat the latter as the culprit."

The language quoted above has particular application to the case at bar. Here the defendant paid the plaintiff her widow's allowance strictly in accordance with the orders of the Probate Court (R. 19). If plaintiff was wronged because the allowance was not paid in a larger amount or at an earlier date, then the wrong was not done by the defendant but by the Probate Court, and no one would seriously contend that a United State District Court has jurisdiction to judge the propriety of the conduct of an Oregon Probate Court in the administration of a decedent's estate. It would be the "height of injustice" to punish personally, by damages, an executor, for failure to turn money over to the plaintiff, since that officer cannot act without the authority of the Probate Judge.

The trial judge, in referring to *Crocker v. Kay,* stated:

> "In effect, what is charged here is that the court (meaning the Oregon probate court) did not take appropriate action by direction to its officer." (R. 31).

Later on he observed that "interference by the federal courts * * * would be intolerable" (R. 34). Yet appellant ignores completely the controlling point that the executor

is but an arm of the court and cannot be made accountable to two masters.

Insofar as the jurisdictional question is concerned, a similar situation exists when a state creates an administrative tribunal and gives such tribunal exclusive jurisdiction over certain matters. The Workmen's Compensation Law of Kansas required the Commissioner of Workmen's Compensation to hear all claims for Workmen's Compensation. In *Employers' Liability Assurance Corp. v. Matlock,* 151 Kans. 293, 98 P. (2d) 456 (1940), an insurance company, in order to avoid liability on a compensation claim filed with the Commissioner, brought suit in a court of general jurisdiction to cancel its insurance policy on the ground of fraud or in the alternative to reform the policy because of mutual mistake. The Kansas Supreme Court held that the trial court had no jurisdiction of the subject matter of the action because *all* issues pertaining to the liability of an employer or an insurer for compensation must be determined by the Commissioner of Workmen's Compensation in accordance with the statutory procedure.

In *McGuire v. U. S. Fidelity and Guaranty Company,* 134 Kans. 779, 8 P. (2d) 389 (1932), an injured workman brought an action against his employer's insurer in a court of general jurisdiction to recover compensation under the provisions of an insurance policy. The Kansas Supreme Court held that the trial court was without jurisdiction to entertain such an action because the injury and the relationship of the parties brought the matter within the scope of The Workmen's Com-

pensation Act and made necessary a determination of the matter by the Commissioner.

As we noted earlier, plaintiff's brief is devoted primarily to the contention that the facts she has alleged constitute a cause of action. Plaintiff advocates a novel theory to the effect that a corporate fiduciary should be held to a higher standard than other fiduciaries in the administration of an estate, plaintiff apparently conceding that by normal standards the administration of the McCan Estate was proper. Plaintiff also indicates (Appellant's Brief, p. 11) that she is unable to offer direct authority for her contention that her Complaint states a cause of action, but can only offer by analogy authority dealing with such unconnected matters as charitable institutions and trusts. These authorities do not bear on the jurisdictional question, and for that reason we will touch on them only briefly.

It is difficult to understand the relevance of plaintiff's reference at p. 14 of her Brief to the recent Oregon Supreme Court decision, *Landgraver v. Emanuel Lutheran Charity Board,* 60 Ore. Adv. Sh. 141, 280 P. (2d) 301 (1955), which refused to overturn the principle that charitable institutions are immune from tort liability. While plaintiff obviously prefers the views of the dissenting justices, this has no bearing on whether or not the federal court has jurisdiction of the subject matter upon which plaintiff's alleged cause of action rests.

Plaintiff also makes the point that an executor is considered a "trustee" for the creditors and beneficiaries of the estate. While this true in a general way, it must

be remembered that there is an important distinction between an executor and a trustee insofar as the jurisdictional question is concerned. Decedent's estates in Oregon are supervised *exclusively* by Probate Courts, as we have shown earlier in this brief, whereas in Oregon trusts, including testamentary trusts, are not supervised by Probate Courts but come under the jurisdiction of courts of general jurisdiction. *In re Roach's Estate,* 50 Ore. 179, 92 Pac. 118 (1907). Thus, in a proper case, a court of general jurisdiction may review the conduct of a trustee to determine whether he has violated his duties, but only the Probate Court can make such a determination concerning an executor.

But even if we consider the nature of an executor's duties to determine the point, wholly irrelevant to the jurisdictional question, as to whether a cause of action is stated, it becomes obvious that no duty has been violated. Under the authorities cited both in this brief and by the trial judge, the executor's duty is to protect and preserve the estate, and pay and distribute it only when ordered so to do by the Probate Court.

Plaintiff discusses and quotes at length from a law review article, "Tort Liability for Interference with Testamentary Expectancies in Decedent's Estates," University of Kansas City Law Review, Vol. 19, p. 78 (1951) (Appellant's Brief, p. 16). Although it might appear from the title that the article is in point, the article does not support plaintiff's contentions either on the cause of action question or the jurisdictional question. The article deals only with wrongfully inducing the execution

or revocation of a Will, wrongfully preventing execution or revocation of a Will and wrongfully suppressing or destroying a Will. The author of the article urges tort liability in those cases by reasoning that a person who "*willfully* causes damage to another" (Appellant's Brief, p 17) should compensate the wronged party, which reasoning has no application whatsoever to an action such as this based on negligence. In any event, the article does not even suggest that an executor is liable in tort for improper administration, nor does it bear upon the jurisdictional question.

In contending that the complaint states a cause of action, plaintiff also cites several cases from other jurisdictions which we have not discussed elsewhere in this brief, that might appear at first glance to support plaintiff on the jurisdictional question, and we will therefore briefly discuss these cases.

Moyers v. Carter, Ct. of Civ. App. of Tex., 61 S.W. (2d) 1027 (1933), cited by plaintiff on p. 21 and p. 23 of her brief, was a proceeding in the Texas District Court, a court having probate jurisdiction. See Texas Constitution, Art. V, Sec. 8, set forth at 61 S.W. (2d) 1031. Also, plaintiff merely recovered her allowance, not damages for delay in payment of the allowance.

Compher v. Compher, 25 Pa. 31 (1855), cited by plaintiff on pp. 21 and 23 of her brief, considered a probate statute giving to the widow, on her application, support money in the specified sum of $300. This was merely a suit by the widow to obtain her $300 support money. The case is not in point because the statute pro-

vided for an automatic, liquidated allowance, payable immediately and without restriction, from the assets of the estate. There was no reason or occasion for the probate court to enter an order fixing either the *time* or *amount* of the payment.

In re Murray's Estate, 158 Pa. Supp. 504, 45 A. (2d) 411, and in *Re Faelchle's Estate* (Ohio), 89 N.E. (2d) 96 (1942), both cited on p. 21 of plaintiff's brief, also considered statutes specifying in dollars and cents the total amount of the allowance.

Both the *Faelchle's Estate case* and *Sawyer v. Heirs of Sawyer,* 28 Vt. 245 (1856), cited on p. 21 of plaintiff's brief, were cases arising in the probate courts in which the widow was attempting to claim her allowance from the estate, and the question before the court was whether the court should grant the allowance.

American-Jewish Joint Distribution Committee v. Eisenberg, 194 Md. 193, 70 A. (2d) 44 (1949), cited by plaintiff on p. 23 of her brief, was a suit initiated by the executor for instructions in the administration of the estate. *Shupe v. Jenks,* 195 Wis. 334, 218 N.W. 375 (1928), also cited by plaintiff on p. 23 of her brief, was an action brought against the executor with the consent of the county judge, and the county judge was a party plaintiff. The proper probate procedure was followed in both cases and the jurisdictional issue was neither raised nor commented on by the court.

Plaintiff makes the point on p. 7 of her brief that a state cannot adopt procedures that limit a constitutional right to litigate a particular matter in the federal courts.

This point is immaterial since there is no constitutional right to obtain a federal court determination as to whether particular conduct of an executor does or does not constitute a proper administration of a decedent's estate. To the contrary, by the Federal Constitution (Amendment X), exclusive jurisdiction is reserved to the state.

Only a court with probate jurisdiction can determine a question intimately connected with the administration of an estate, and neither the United States District Court nor the general courts of Oregon have probate jurisdiction.

This case raises issues that are so closely connected with the administration of the estate of C. P. McCan that these issues can be determined only by the Probate Court of Multnomah County and by no other court.

The complaint itself concedes that plaintiff seeks recovery exclusively for alleged violations of duties *of an executor*. Plaintiff alleged in paragraph VIII of her complaint (R. 7) "defendant was negligent in the performance of its duties on behalf of the estate of Charles P. McCan * * *". Plaintiff alleged in paragraph XII of her complaint (R. 10): "During the period of more than six months from the 9th day of January, 1952, to and including the 18th day of July, 1952, defendant failed to exercise diligence and was negligent in the performance of the duties required of it by law assumed by it as executor of the Will of Charles P. McCan." Plaintiff also alleged in paragraph XIV of her complaint (R. 12): "As a result of the negligence of defendant in the perform-

ance of the duties assumed by it in the administration of the estate of Charles P. McCan, Deceased, * * *". Plaintiff also admits in her brief that her action is "based upon the negligence of the Bank in administering the estate". (Appellant's Brief, p. 2).

What the plaintiff seeks to accomplish is to substitute the judgment of a federal court jury for the judgment of the Multnomah County Probate Judge as to whether defendant did or did not administer the McCan estate in the proper manner.

The specific conduct of which plaintiff complains is conduct peculiarly woven into the administration of the estate. Only the Probate Court of Multnomah County can determine:

(1) Whether defendant owed plaintiff a duty to file an Inventory and Appraisement, and when the Inventory and Appraisement should have been filed;

(2) Whether defendant owed plaintiff a duty to give information concerning the estate, what information should have been given, when, to whom and in what manner it should have been given;

(3) Whether defendant owed to plaintiff a duty to pay a widow's allowance, when and in what amount the allowance should have been paid.

Specific provisions of the Oregon Probate Code deal with each of these matters, thereby demonstrating the obvious fact that these matters fall within probate jurisdiction. It is also important to note that none of the facts alleged amount to a violation of the specific provisions of any statute.

The time and manner of filing the inventory are regulated by OCLA 19-401 (ORS 116.405), which gives the probate judge express power to extend or fix the time for filing (See appendix). Who but the probate judge could determine when the inventory shall be filed? Can a federal court be permitted to fix a date different from that determined by the court of which the executor is an officer?

The method of "giving information" by executors as to the affairs of an estate is equally governed exclusively by the probate court. The statutory methods for affording information to interested persons are the previously mentioned procedure for filing the inventory and the further statutory provisions for the filing of periodic accounts, OCLA 19-1001 and 19-1002 (ORS 117.010 and 117.020) (See appendix). Under the latter section, if the executor fails to file an account within the time provided, he may be cited by the probate court and punished for contempt.

As to the widow's allowance before and after the filing of the inventory, this is governed respectively by OCLA 19-601 and 19-603 (ORS 116.005 and 116.015). Under each statute the *time* and *amount* of each payment is to be fixed by the *Probate Court.*

> *"OCLA 19-601. Possession of homestead, wearing apparel and furniture before inventory: Provision for widow and children during such period.* Until administration of the estate has been granted and the inventory filed, the widow and minor children or husband and minor children of the deceased, as the case may be, are entitled to remain in the possession of the homestead, all the wearing apparel of the

family and household furniture of the deceased, and also the widow and minor children shall have a reasonable provision for their support during such period, to be allowed by the court."

"*OCLA 19-603. Further order for support: When made.* If the property so exempt is insufficient for the support of the widow and minor children, according to their circumstances and condition in life, for one year after the filing of the inventory, the court or judge thereof may order that the executor or administrator pay to such widow, if any, and if not, then to the guardian of such minor children, an amount sufficient for that purpose; but such order shall not be made unless it appear probable that the estate is sufficient to satisfy all the debts and liabilities of the deceased, and pay the expenses of administration in addition to the payment of such amount."

Likewise, OCLA 17-118 (ORS 113.070) merely states that a widow "shall have her reasonable sustenance out of the estate for one year". It does not specify either the *time* or *amount* of payment, leaving such matters to the discretion of the Probate Court.

It is clear that these statutes which are at the heart of plaintiff's case require a determination by the probate court as to time, availability of assets, and amount of payment *before* any duty is imposed on the executor to make payment.

Under normal practices neither a distributee nor a widow has any claim to funds in the possession of an executor unless and until the right to them is established by order of the probate court. In *Cass v. Harder,* 153 Ore. 637, 58 P. (2d) 618 (1936), cited previously, a distributee of an estate was held to have no claim in a court

of general jurisdiction against an executor for delay in distribution where no decree of distribution had been entered by the probate court.

In *Hurley v. Hirsch,* Ct. of Civ. App. of Tex., 66 S.W. (2d) 387 (1933), the widow of the deceased, as administratrix, had obtained a decree of distribution directing the distribution of the entire estate to her. By proper procedure, Hirsch petitioned for a writ of certiorari, and established that she was an illegitimate daughter of a deceased daughter of the deceased and entitled to share in the distribution of his estate. The Appellate Court reformed the judgment of the lower court on this basis.

On a motion for a rehearing, Hirsch contended that she was entitled to interest on her share of the estate. The Court stated at 66 S.W. (2d) 393:

> "An administrator is not required and legally cannot distribute or pay out funds in his custody, except on proper order of the probate court, and it cannot be said that it is a breach of duty for an administrator to refuse distribution, or refuse to pay a claim without the proper order from the court, or for paying out the funds when ordered by the court so to do."

The Court then held that since the administratrix had distributed the entire estate to herself under an order of the probate court, there could be no liability to Hirsch until the order was annulled and vacated and a new order entered, and then only if the administratrix declined to distribute as ordered.

If a distributee has no claim against an executor for

failure to distribute before a court order, a widow, similarly, should have no such claim.

If an executor pays a widow's allowance without a probate court order, he assumes the risk of a surcharge in the event that the probate court does not later authorize his payment.

U. S. Fidelity & Guaranty Co. v. Greer, 29 Ariz. 203, 240 Pac. 343 (1925).
In re Lux's Estate, 100 Calif. 606, 609, 35 Pac. 345, 639 (1894).

In both of the above cited cases, the executor was surcharged because he paid a widow's allowance which was not authorized by an order of the probate court. In *U. S. Fidelity & Guaranty Co. v. Greer,* the Court said at 240 Pac. 347, "Every dollar paid the widow without authority from the probate court was illegally paid, and stood as a charge against the administrator."

Howard v. Davis, 192 Ga. 613, 15 S.E. (2d) 865 (1941), was a suit by a widow and minor children attempting to set aside a decree of a probate court discharging the administrator, in which the plaintiffs prayed for a judgment against the administrator and his surety. The entire estate had been consumed in the payment of debts, and under Georgia law, the payment of a widow's allowance had priority over these debts. The widow had not previously applied for an allowance, and the probate court had not entered an order granting the allowance. The widow alleged that if she had known of the appointment of the administrator, she would have applied for her allowance. In affirming a judgment sus-

taining a demurrer to the widow's petition, the court made the following statement at 15 S.E. (2d) 866:

> "Although a judgment for a year's support would have ranked ahead of the debts, the mere fact that these plaintiffs by relationship occupied a position which would entitle them to apply for and obtain such a judgment, would not entitle them, without having it allowed in the only way provided by law, to have a recovery against the administrator and his surety, A year's support to be enforceable must be manifest in a judgment. It is not in existence as such until such judgment."

See also *Winkle v. Winkle,* 8 Ore. 194 (1879), cited previously, where the Oregon court, in refusing to take jurisdiction of a suit to establish a trust in property which the probate court had set aside to the widow as exempt property, stated at 8 Ore. 196:

> "The title to the personal property of a deceased person must be derived from the administrator through the orders of the court, and the orders of said court, and the distribution made under them of personal property, are binding on all persons who are interested in the estate, provided such orders are regular and in due form of law. * * * For the statute has conferred on the county court exclusive jurisdiction in all matters pertaining to the transfer of the title to personal property of deceased persons. A court of equity has no jurisdiction over it."

It is difficult to conceive of a situation more closely and intimately connected with the probate of an estate than the determination by a court of time of payment and amount of a widow's allowance.

If appellant is correct, it is easily possible that a probate court and a federal court could arrive at completely

different conclusions as to whether a duty to act exists and as to the time and manner of its performance. Appellant has no answer for this argument for the obvious reason that none exists. As the trial judge clearly stated: "If it be assumed there was a duty to the widow to obtain an allowance for her, the administrator would be under a tremendous burden if the probate court refused to grant the order. Clearly, this shows that the coercion would be brought on the probate court and interference with administration would be patent." (R. 33).

Appellant criticizes the above procedures stressed by the trial court for controlling the actions of an executor, as "wholly inadequate and meaningless." Assuming, arguendo, that they are, the federal courts have no power to act unless and until the state, by legislative act, surrenders the exclusive control of its probate courts over executors to courts of general jurisdiction. Moreover, as has been pointed out, appellant both by these statutory remedies, and by others had adequate opportunity for relief within the framework of the present probate code.

If jurisdiction existed in any court except the Probate Court to determine the nature and extent of the duties here involved, no executor or administrator could safely follow the orders of the court appointing him, of which he is an officer, and to which he is directly responsible. Under plaintiff's reasoning, although the Multnomah County Probate Court has exclusive jurisdiction over the administration of the McCan Estate, an independent state or federal court has jurisdiction to arrive

at a different determination concerning the duties of the executor, such as the amount and time of payment of a widow's allowance, time of filing an Inventory and Appraisal, and the furnishing of information to persons interested in the estate. If this Court sustains plaintiff's contention, not only is the exclusive jurisdiction of the Oregon Probate Courts at an end, but the orderly administration of a decedent's estate in Oregon will be impossible, because an executor will no longer be protected by acting in conformance with the orders of probate courts.

Here, the Probate Court ordered the defendant, as executor, to pay specific amounts to plaintiff at specific times as a widow's allowance (R. 17, 18), and plaintiff now contends that the District Court has jurisdiction to adjudge that payments should have been made at different times, and presumably in different amounts. On June 23, 1952 the Probate Court granted defendant an extension of time until July 18, 1952 to file an Inventory and Appraisement (R. 17), and plaintiff now contends that the District Court has jurisdiction to adjudge that defendant had a duty to file the Inventory and Appraisement prior to July 18, 1952. Concerning plaintiff's third allegation of negligence, defendant's failure to furnish information of some sort to complainant and others, there was no Probate Court order only because neither the plaintiff nor anyone else brought the matter before the Court by timely petition for a decision.

Let us assume for the moment that plaintiff's contention of jurisdiction is correct, and let us assume further

that an executor is improperly administering an estate, as for example by failing to file his Inventory and Appraisement. Will some interested party bring this failure to the attention of the Probate Court so that the Court can perform its duty and see that corrective action is taken, in accordance with the Probate Code? Certainly not, for potential rewards are much greater if the interested party bides his time, ignores his remedies in the Probate Court, and later brings an action for substantial damages in a court of general jurisdiction, as plaintiff has done here. Such a situation would defeat the obvious purpose of the Oregon Probate Code, which is to promote the proper and orderly administration of decedent's estates *by the Probate Courts.*

Appellant repeatedly argues that a probate court cannot try an action for damages based on negligence. The argument is not an accurate one. Where the executor's breach of duty consists of the negligent administration of an estate and results in damage to the estate, the personal representative may be surcharged in the probate hearings on his accountings.

Moreover, our position does not deprive plaintiff of a remedy in damages, in some court other than the Probate Court, once the executor's duty has been established by the Probate Court. If the executor had been ordered by the Probate Court to pay a widow's allowance, file an Inventory and Appraisement or do some other specific thing at a particular time, but wrongfully failed so to do, presumably damages necessarily flowing from this failure could be assessed in an independent action. This

would be an orderly procedure and not one involving inconsistent adjudications as to the nature and extent of a probate duty.

If plaintiff had come into the United States District Court and alleged facts showing that the defendant had improperly administered the McCan estate, and *that the Probate Court of Multnomah County had determined that defendant's administration of the estate was improper,* and that such misconduct proximately caused compensable injury to the plaintiff, then the District Court could, conceivably, have had jurisdiction over the subject matter. The Court, without usurping probate jurisdiction, could then proceed and determine whether or not plaintiff's alleged facts constituted a cause of action, and if it decided in the affirmative, it could try the case on the merits.

Also, if an improper delay had been brought to the Probate Court's attention, and the Court, either on petition for removal under OCLA 19-222, (ORS 115.470), or on its own motion under OCLA 19-226, (ORS 115.490), had removed the executor after making a determination of improper delay and the time when the payment should have been made, or the Inventory and Appraisement filed, or other information furnished, plaintiff might have had a cause of action for damages in an independent action. Again, there would be no conflict between the orders of the Probate Court and another court.

Although a remedy may be available in a court of general jurisdiction in the above situation, it should be

pointed out that plaintiff also had a remedy in the Probate Court. Actually, plaintiff's only *real* remedy was in the Probate Court of Multnomah County. If the circumstances were such that defendant ought to have paid a widow's allowance to plaintiff on February 5, 1952, then plaintiff on or about that date should have petitioned the Probate Court for an order directing payment. That Court, and no other, could determine whether estate funds were available and should have been paid to plaintiff at that time, and only that Court could determine the amount and order the defendant, as executor, to make such payment.

If the executor or any other interested party deemed that plaintiff's demands for an allowance were unwarranted or improper, such person could have resisted the petition. The hearing on a petition for a widow's allowance is an adversary proceeding and the order granting or denying the allowance constitutes a final judgment from which an appeal may be taken to the Oregon Supreme Court. *In Re Frizzell's Estate,* 95 Ore. 681, 188 Pac. 707 (1920), and *Aamoth v. Larson,* 197 Ore. 267, 253 P. (2d) 268 (1953). Likewise, on or about the date that plaintiff felt that she was entitled to an immediate filing of the Inventory and Appraisement, and to other information concerning the estate, she could have petitioned the Probate Court for an order directing the executor to perform whatever acts plaintiff desired.

It was thus within plaintiff's power to avoid in its entirety the injury she alleges; she need only have presented timely petitions to the Probate Court of Multnomah County.

Appellant argues that there was some affirmative duty on the executor itself to petition the probate court to fix a widow's allowance and pay it. This is simple "ipse dixit" reasoning, with no statutes or cases of any kind cited in support.

The opinion of the trial judge cites cases which show quite clearly that it is not the executor's duty to make application for the allowance, that the executor, in fact, has a duty to challenge requests for such allowances when adverse to the best interests of the estate, and that these adverse interests can only be resolved in the probate court. *Biersdorf v. Putnam,* 181 Ore. 522, 182 P. (2d) 992 (1947), *In re Shepherd's Estate,* 152 Ore. 15, 41 P. (2d) 444, 49 P. (2d) 448 (1935), *In re Ballard's Estate,* 181 Ore. 7, 179 P. (2d) 732 (1947), *In re Frizzel's Estate,* 95 Ore. 681, 188 Pac. 707 (1920), *Dekum v. Dekum,* 28 Ore. 97, 41 Pac. 159 (1895), and *In re Mead's Estate,* 147 Ore. 400, 34 P. (2d) 346 (1934).

OCLA 19-602 (ORS 116.010) requires that the court shall make an order setting apart for the widow all the property of the estate exempt from execution. This statute has been interpreted to place a duty upon the probate court which, as the trial judge here stated, "does not arise, however, until the surviving or minor children *request* that the homestead * * * be set aside * * *.' *Jenning v Jenning,* 197 Ore. 366, 253 P. (2d) 276." (R. 35).

See also *Iltz v. Krieger,* 104 Ore. 59, 202 Pac. 409, 206 Pac. 550 (1922), in which the court held that a widow's homestead right does not vest in her "in the

absence of an order of the probate court setting the same apart to her."

There is no reason to suppose that the statutes concerning widow's allowances should be construed differently to require an executor to apply for an allowance.

Appellant asserts that an executor "pays the debts of the decedent without any order of court" and cites *"Stewart's Estate,* 145 Ore. *160,"* 28 P. (2d) 642 (1934). Appellant overlooks the fact that the executor does so at his peril and that if he does pay a claim without reliance upon the procedure of rejecting the claim and having it determined by court order after adversary proceedings, he may be surcharged when its validity is challenged in hearing upon his final account. Also, appellant overlooks OCLA 19-1003 (ORS 117.030) which requires the Probate Court to order and direct the payment of claims.

The Oregon supreme court in *Re Mead's Estate,* 145 Ore. 150, at 161, 26 P. (2d) 1103 at 1107 (1933), erroneously cited by appellant as *"In re Stewart's Estate,"* stated:

> "Even if the court had, on ex parte application of the administrator, authorized these payments, it still retained jurisdiction to disallow the claims when their validity was later questioned. 24 CJ 379, sections 1058, 1059."

In re Stewart's Estate, referred to by appellant, whose correct citation is 145 Ore. *460* does *not* impose a duty on an executor to pay claims of creditors without a court order. It recognizes that an administrator may be

entitled to credit in his final account for payments made to distributees, or for expenses, without first obtaining a court order, where the payment made is found by the court to be a proper one. However, as the Oregon court was careful to point out at 145 Ore. 472, 28 P. (2d) 646:

> "It is also stated in 24 C.J. 498, section 1339, as follows:
>
> " 'Voluntary payments to distributees without an order or decree of court authorizing the same are made by the representative at his own peril * * *.' "

It is completely foreign to the idea of probate that an executor pay out money of the estate, or distribute its property without an order of court.

Appellant refers to *Re Workman's Estate,* 156 Ore. 333, 65 P. (2d) 1395, 68 P. (2d) 479 (1937), quoted earlier in this brief, as an authority for the proposition that the executor, if in doubt as to its duties, should have consulted the probate judge. While the probate court has supervisory powers over its representative, this jurisdiction is exclusive of that of any other court. As the court there stated at 156 Ore. 390, 68 P. (2d) 481:

> "The probate court or judge is the actual guardian of the estate, and all proceedings are under its direction. The executor or administrator derives his power from the order of the court issuing his letters, and acts simply under its control."

The point which appellant most patently fails to meet is that no court, except the probate court, can determine whether its officer, the executor, has been remiss in his duties. How can any court of general jurisdiction determine what the probate court for Multnomah Coun-

ty would have done had matters of the kind here involved been brought to its attention at some earlier or different time? All we know is that this very court has already determined both the proper time for payment and the amount of the widow's allowance (R. pp. 18, 19), that these orders have become final, and that appellant here asks the federal court to arrive at an entirely different result. The confusion and injustice which would be involved to permit such a result demonstrate clearly that the exclusive jurisdiction to determine these issues vested in the probate court. The fact that the probate court has already determined these issues adversely to appellant serves to illustrate that an executor cannot be responsible to two masters, for the obvious reason that the exclusive jurisdiction of the probate court withdraws the issues here sought to be litigated from all courts of general jurisdiction, whether state or federal.

We do not contend that the United States District Court lacks jurisdiction to try all types of tort actions against executors. Such court has jurisdiction to try any tort action that does not require an initial determination as to the existence and extent of a strictly probate duty of an executor.

An executor is personally liable for certain torts committed against third persons when he is acting as executor, not because he has violated any probate duty as executor, but because he has violated a duty imposed by statute or the common law on *all* persons, whether an executor or not, such as to use due care, or to refrain from trespass or conversion. The duty is not a probate

duty and is not owed to persons who are given by statute an interest in the estate of a deceased person. The interests or rights of the latter, and the correlative duties of an executor to them, are essentially probate in nature and rest entirely, first, on the existence of local statutes providing for the interests of heirs or devisees, or special statutory interests, such as the right of a widow to an allowance, and, second, on the determination by the Probate Court of the existence and extent of such interests after proper probate proceedings. When, on the other hand, an executor is held personally liable in tort to third persons, the liabilty is not to a probate beneficiary, such as a widow, (except by rare coincidence), and does not pertain to an executor's probate duty to such beneficiary. The executor is personally liable for such torts involving third persons irrespective of whether or not he is an executor and whether or not the claimant is a probate beneficiary. In the one instance the duty stems solely from probate status; in the other, probate status has nothing to do with determining the duty said to be violated and forming the basis for the tort. An analysis of the many cases annotated in 44 A.L.R. 637, dealing with the personal liability of an executor for ordinary torts committed against third persons, bears out our position.

On this basis, the case of *Watkins v. Madison County Trust and Deposit Co.* (CCA 2d), 24 F. (2d) 370 (1928), which plaintiff cites on p. 8 of her brief, is distinguishable. The Court in that case made a statement to the effect that a court of general jurisdiction may entertain an action of trover against an executor, with which state-

ment we are in complete agreement, considered in the light of the facts of that case. The Court made such a statement in the course of affirming a judgment in favor of the defendant-administrator on the ground that plaintiff was barred by the Statute of Limitations. It was not necessary for the court to make a determination as to the existence or extent of any probate duty of the administrator.

If, however, as in the case of *Johnson v Ford* (CC D Ore.), 109 F. 501 (1901), discussed previously in this brief, the determination of a strictly probate question is essential to plaintiff's cause of action, the court lacks jurisdiction even though conversion is alleged.

It is apparent that plaintiff is merely seeking, through the indirect device of an action for damages, to litigate in the United States District Court probate matters that can only be determined by the Probate Court of Multnomah County. The probate issues are the heart of plaintiff's case.

The opinion of the Honorable Judge in the Court below is well founded in law, and the judgment of the lower court should be affirmed.

PENDERGRASS, SPACKMAN & BULLIVANT
R. R. BULLIVANT
V. V. PENDERGRASS
JACK L. HOFFMAN

APPENDIX

OCLA 13-206. "Jurisdiction of abolished county courts in counties over 100,000 vested in circuit courts. Upon the taking effect of this act, all judicial jurisdiction, power and authority of the county judges and county courts which are abolished by the provisions of section 93-310, as distinguished from such power and jurisdiction as is exercised in the transaction of county business, shall then and thereafter be vested in and exercised by the circuit court of the judicial districts comprising such county, and all matters, causes and proceedings pending in such county courts shall be, and they are by this act, transferred and continued, and shall hereafter be heard and determined in the said circuit court."

NOTE: This section was repealed by Ore. Laws 1949, Ch. 530, Sec. 17, but the transfer of probate jurisdiction in Multnomah County accomplished by OCLA 13-206 was continued by the remainder of Ore. Laws 1949, Ch. 530.

OCLA 13-501. "Jurisdiction. The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is:

(1) To take proof of wills;

(2) To grant and revoke letters testamentary of administration and of guardianship;

(3) To direct and control the conduct, and settle the accounts of executors, administrators and guardians;

(4) To direct the payment of debts and legacies, and the distribution of the estates of intestates;

(5) To order the sale and disposal of the real and personal property of deceased persons;

(6) To order the renting, sale or other disposal of the real and personal property of minors;

(7) To take care and custody of the person and estate of a lunatic or habitual drunkard, and to appoint and remove guardians therefor; to direct and control the conduct of such guardians, and settle their accounts;

(8) To direct the admeasurement of dower."

OCLA 19-222, as amended by Ore. Laws 1949, Ch. 417. "Any heir, legatee, devisee, creditor or other person interested in the estate may apply for the removal of an executor or administrator who has ceased to be a resident of this state, or become mentally incompetent, or been convictd of any felony or a misdemeanor involving moral turpitude, or who, in any way, has been unfaithful to or neglectful of his trust to the probable loss of the applicant or the estate. Such application shall be by petition and upon notice to the executor or administrator, served in the manner provided for the service of summons, and if the court find the charge to be true, it shall give and make an order removing such executor or administrator, and revoke his letters."

OCLA 19-226. "Power of court over representative: Citation to show cause against removal: 'Removal on failure to appear or show cause. Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exists or have transpired, as specified in section 19-222, it shall be the

duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and if he fail to appear or show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law."

OCLA 19-401. " Inventory of estate: When and how made. An executor or administrator shall, within one month from the date of his appointment, or, if necessary, such further time as the court or judge thereof may allow, make and file with clerk an inventory, verified by his own oath, of all the real and personal property of the deceased which shall come to his possession or knowledge."

OCLA 19-602. "Exempt property: Setting apart: Use and expenditure by survivor. Upon the filing of the inventory the court or judge thereof shall make an order setting apart for the widow, widower or minor children of the deceased, if any, all the property of the estate exempt from execution, according to exemption laws in effect as of date of death of deceased. The property thus set apart is the property of such widow or widower to be used or expended by him or her in the maintenance of herself and minor children, if any; or if there be no widow or widower it is the property of the minor child; or if more than one child, then of the minor children in equal shares, to be used or expended in the nurture and educa-

tion of such child or children by the guardian thereof, as the law directs."

OCLA 19-1001. "Semi-annual accounts: Rendering and filing: Matters to be shown. An executor or administrator shall, within the first ten days of April and October of each year, until the administration is completed and he is discharged from his trust, render an account verified by his oath, and file the same with the clerk, showing the amount of money received and expended by him, from whom received and to whom paid, with the proper vouchers for such payments, the amount of the claims presented against the estate and allowed or disallowed, and the name of the claimants of each, and any other matter necessary to show the condition of the affairs thereof; provided, however, that in case the date of the notice of the appointment of said executor or administrator shall be within sixty days next preceding the first day of April or October, the filing of such account shall be omitted until the succeeding April or October."

OCLA 19-1002. "Proceeding if representative neglects to file an account. An executor or administrator who shall fail to file an account, as required in the last section, may be required by a citation, ordered by the court or judge, to appear and do so, either upon the application of an heir or creditor, or other person interested in the estate, or without it. If the executor or administrator refuse or neglect to appear when cited, or to file the account as required, he may be punished for a contempt, or by warrant of the judge be committed at once to close custody in the jail of the county until he consent to do so."

OCLA 19-1003. "Order for payment of the expenses, charges, and claims. At the first term of the court after the filing of the first semi-annual account and each semi-annual account thereafter, the court shall ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed by the executor or administrator, within the first six months or any succeeding period of six months thereafter, after the date of the notice of his appointment, after paying the funeral charges and expenses of administration; and if so, it shall so order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum of such claims it is sufficient to satisfy, and order and direct accordingly."

No. 14655

United States
Court of Appeals
for the Ninth Circuit

WALTER C. DURST, assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, Debtors, Appellant,

vs.

JACK P. KALPAKOFF and MARY KALPAKOFF, and WILLIAM CHERNABAEFF, Trustee in Bankruptcy of the Estate of Jack P. Kalpakoff and Mary Kalpakoff, Appellees.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —7-20-55

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MORRIS LAVINE,

215 West Seventh Street,
Suite 620,
Los Angeles 14, California.

For Appellees:

SIEMON & SIEMON,

259 Haberfelde Building,
Bakersfield, California.

In the District Court of the United States, Southern District of California, Central Division

No. 60964-T—Bkcy.

In the Matter of JACK P. KALPAKOFF, Debtor.

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE

Under Section 422, Chapter XII, of the Real Property Bankruptcy Act

At Los Angeles, in said District, on April 28, 1954 before the said Court the petition of Jack P. Kalpakoff that he desires to obtain relief under Section 422 of the Bankruptcy Act and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Jack P. Kalpakoff shall attend before said referee on May 6, 1954 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of

said Court, and the seal thereof, at Los Angeles, in said District, on April 28, 1954.

EDMUND L. SMITH,
Clerk
/s/ By ARTHUR P. FLORES,
Deputy Clerk

[Endorsed]: Filed April 28, 1954.

In the District Court of the United States, Southern District of California, Central Division

No. 60964-T—Bkcy.

In the Matter of MARY KALPAKOFF, Debtor.

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE

Under Section 422, Chapter XII, of the Real Property Bankruptcy Act

At Los Angeles, in said District, on April 28, 1954, before the said Court the petition of Mary Kalpakoff that she desires to obtain relief under Section 422 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Benno M. Brink, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said Acts;

and that the said Mary Kalpakoff shall attend before said referee on May 6th, 1954 and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Ben Harrison, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 28, 1954.

EDMUND L. SMITH,
Clerk
/s/ By ARTHUR P. FLORES,
Deputy Clerk

[Endorsed]: Filed April 28, 1954.

[Title of District Court and Cause No. 60963.]

DEBTOR'S PETITION

To the Honorable The Judges of the District Court of the United States for the Southern District of California:

The petition of Jack P. Kalpakoff residing at Route 4, Box 803, in the City of Lancaster, County of Los Angeles, State of California, (engaged in the business of farming), respectfully represents:

1. Your petitioner has had his principal place of business at Sixtieth and "J" Streets, Lancaster, California, within the above judicial district, for a longer portion of the six months immediately pre-

ceding the filing of this petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. Your petitioner is unable to pay his debts as they mature, and proposes the following arrangement with his secured creditors: to be paid 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have equitable interest other than right to redeem from a sale had before filing this petition.

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy. 10 days requested.

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act. Ten days requested within which to file.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory

contracts, as required by the provisions of said Act. Ten days requested within which to file.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act. Ten days requested within which to file.

Wherefore your petitioner prays, that proceedings may be had upon this petition in accordance with the provisions of chapter XII of the Act of Congress relating to bankruptcy.

/s/ JACK P. KALPAKOFF,
Petitioner

DEBTOR IN PROPRIA PERSONA
Attorney for Petitioners

United States of America,
State of California—ss.

I, Jack P. Kalpakoff, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ JACK P. KALPAKOFF, Petitioner

Subscribed and sworn to before me this 14th day of April, 1954.

[Seal] /s/ WAYNE M. HAMILTON,
Notary Public

* * * * *

Schedule B. Statement of All Property of Debtor

Schedule B-1—Real Estate

Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.—Estimated value of Debtor's Interest.

Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, created November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California.....$ 65,000.00

The Northwest quarter of Section 23, Township 7, North Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.... 65,000.00

Total.....$130,000.00

/s/ JACK P. KALPAKOFF, Petitioner

* * * * *

[Endorsed]: Filed April 28, 1954.

[Title of District Court and Cause No. 60963.]

AMENDED PETITION AND SCHEDULES

Filed to correct and supplement former petition and schedules; to include proposed arrangement and complete list of creditors having no security (Schedule A-3) other than such security as they may have under the assignment to Walter C. Durst for the benefit of creditors, said creditors not being listed in former petition; and to tender summary of liabilities and assets and classification of creditors as required by Sec. 435.

This petition and these schedules are duplicates of petition and schedules in the Matter of Mary Kalpakoff, Debtor, Bankruptcy No. 60964-T, wife of the above captioned debtor, the assets being community property of the spouses and the liabilities being common to both.

Dated: May 24th, 1954.

SIEMON & SIEMON,
/s/ By ALFRED SIEMON,
Attorneys for Debtor

* * * * *

Schedule B.—Statement of All Property of Bankrupt

Schedule B-1—Real Estate

Location and Description of all real estate owned by debtor, or held by him, whether under deed, lease or contract—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.—Estimated value of debtor's interest.

Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, cre-

ated November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California.....	$ 65,000.00
The Northwest quarter of Section 23, Township 7, North Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning	65,000.00
Total.....	$130,000.00

/s/ JACK P. KALPAKOFF, Petitioner

* * * * *

[Endorsed]: Filed May 27, 1954.

[Title of District Court and Cause 60963-T.]

PETITION TO DIRECT ASSIGNEE FOR THE BENEFIT OF CREDITORS TO TURN OVER PROPERTY

To Benno M. Brink, Referee in Bankruptcy:

The petition of Jack P. Kalpakoff respectfully represents:

1. On April 28, 1954, your petitioner filed his

petition herein under Chapter XII of the Bankruptcy Act, proposing an arrangement; and has petitioned for the appointment of a trustee which is now pending action thereon.

2. Prior to filing said petition proposing an arrangement and on November 25, 1949, petitioner and his wife Mary Kalpakoff, Debtor in Bankruptcy No. 60964-T, made a general assignment for the benefit of their creditors to Walter C. Durst whereby they assigned to said Durst all of their property which is particularly described in Exhibit "A" hereto attached and made a part hereof by this reference as fully as if the description of said property were set forth at this place; that concurrently with the execution of said assignment your petitioner executed deeds and transfers which conveyed all of the right, title and interest of petitioner in said property to said Durst; that at said time petitioner, at the direction of said assignee, made and delivered a promissory note for the sum of $90,000.00 payable to said assignee on demand, and made, executed and acknowledged crop mortgages whereby petitioner mortgaged to said assignee all crops growing and to be grown on parcels 1 and 2 of the real property so conveyed to secure the payment of said promissory note, and said assignee caused said mortgages to be recorded in each of the counties where said parcels are respectively located; that thereupon and as a part of the same transaction petitioner made, executed and acknowledged a so-called General Assignment, a copy of which is hereto attached, marked Exhibit "B" and made a

part hereof by this reference as fully as if set forth at length at this place; and, at the same time, at the request of said assignee, and on his advice and direction, executed an agreement, in writing, to pay assignee fees and commissions, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof as fully as if set forth at length at this place.

3. Notwithstanding the matters alleged in the preceding paragraph petitioner remained and has continued to remain and is now in the actual and exclusive possession of all of said property except parcels 3, 4 and 5 thereof as described in Exhibit "A", which were sold by the assignee since the assignment; and that the assignee still holds the legal record title to all of said property other than that which has been sold as aforesaid and still holds and retains said note and crop mortgage.

4. Your petitioner has demanded that said assignee reconvey all of the property he now holds, and that he release said crop mortgages of record, but he has refused and continues to refuse to reconvey any of said property or to release either of said crop mortgages; that petitioner commenced and is maintaining an action against the assignee in the Superior Court of the State of California in and for the County of Los Angeles for the recovery of their properties and they attach a copy of the verified Third Amended Complaint therein to this petition; that the assignee obstructed petitioner from obtaining any relief therein by dilatory proceedings and by compelling petitioner to bring in and make

all of petitioner's creditors parties defendant; that in the meantime the assignee failed to protect the properties assigned to him from foreclosure and sale, defaulted on obligations secured by deeds of trust on Parcels 1 and 2, and said properties were advertised for sale on foreclosure; that thereupon petitioner demanded of the assignee that he remedy such defaults and prevent the loss of said properties; that the assignee, in response to such demand, prepared the original petition herein for petitioner, caused petitioner to sign and verify it, appeared with petitioner and filed said petition, and secured the stay-order restraining foreclosure proceedings on April 29, 1954; and that thereafter the assignee advised petitioner that he, the assignee, could do nothing further for petitioner, that he was not acting as petitioner's attorney, and for petitioner to get an attorney to represent him in this proceeding.

Wherefore, your petitioner prays that Walter C. Durst, as such assignee, be directed to surrender and reconvey all of the property he now holds under the assignment for the benefit of creditors to your petitioner or to the trustee who may be appointed herein, and that your petitioner have such other and further relief as is just.

/s/ JACK P. KALPAKOFF,
Petitioner
/s/ SIEMON and SIEMON,
Attorneys for Petitioner

Duly Verified.

EXHIBIT "B"

GENERAL ASSIGNMENT

This Assignment, made this 25th day of November, 1949, by Jack P. Kalpakoff and Mary Kalpakoff, his wife, of Lancaster, California, parties of the first part, hereinafter referred to as assignor, to Walter C. Durst of Los Angeles, California, party of the second part, hereinafter referred to as assignee.

Witnesseth: That said assignor, for and in consideration of the covenants and agreements to be performed by the party of the second part, as hereinafter contained, and of the sum of One Dollar ($1.00) to assignor in hand paid by said assignee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, assign, convey and transfer unto said assignee, his successors and assigns, in trust, for the benefit of assignor's creditors generally, all of the property of the assignor of every kind and nature and wheresoever situated, both real and personal, and any interest or equity therein not exempt from execution, including all appurtenances, tools, equipment, livestock, growing crops, books accounts, books, bills receivable, cash on hand, choses in action, insurance policies, and all other personal property of every kind and nature situated in or pertaining to that certain ranch, known as the "Home Ranch" and now owned and conducted by said assignor, in the City of Lancaster, County of Los Angeles, State of California.

Subject however, to all valid and subsisting liens and encumbrances thereon. Also, that real property located in the City of Los Angeles, County of Los Angeles and State of California.

There is included in this Assignment, leases and leasehold interests in real estate and all real property covered by the Agreement for Sale of Real Estate recorded November 27, 1948, in Book 1396 of Official Records, page 283, Kern County Records, being property known as "The Potato Ranch".

Said assignee is to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by the assignor to sell and dispose of the said property upon such time and terms as he may see fit, and is to pay to creditors of the first party pro rata, according to the several indebtedness due to them from the said assignor, the net proceeds arising from the conducting of said business and sale and disposal of said property after deducting all moneys which said assignee may at his option pay for the discharge of any lien on any of said property and any indebtedness which under the law is entitled to priority of payment, and all expenses, including a reasonable fee to assignee and his attorney.

This assignment shall be construed as a general assignment for the benefit of creditors generally.

In Witness whereof, the said parties have here-

unto set their hands the day and year first above written.

JACK P. KALPAKOFF,
MARY KALPAKOFF,
Assignor

WALTER C. DURST,
Assignee

State of California,
County of Los Angeles—ss.

On November 25, 1949 before me, the undersigned, a Notary Public in and for said County and State, personally appeared Jack P. Kalpakoff and Mary Kalpakoff and Walter C. Durst; known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] PHILIP M. SCHWABACHER,
Notary Public in and for said County and State

EXHIBIT "C"

AGREEMENT RE FEES OF ASSIGNEE FOR THE BENEFIT OF CREDITORS

The undersigned hereby agrees that the fees and compensation of the assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, shall be ten per cent of all money and property of the assignment estate, which shall be ad-

ministered or handled by Walter C. Durst, Assignee for the Benefit of Creditors, including property returned to the Assignors.

Dated this 25th day of November, 1949.

JACK P. KALPAKOFF
MARY KALPAKOFF

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause 60964.]

PETITION TO DIRECT ASSIGNEE FOR THE BENEFIT OF CREDITORS TO TURN OVER PROPERTY

To Benno M. Brink, Referee in Bankruptcy:

The petition of Mary Kalpakoff respectfully represents:

[Printer's Note: Paragraphs 1-4, Exhibits B and C are the same as in Cause 60963 and are set out at pages 10-17.]

Petitioner alleges that she is the wife of Jack P. Kalpakoff, the debtor in Bankruptcy No. 60963-T; that she read and is familiar with the Petition to Direct Assignee for Benefit of Creditors to Turn Over Property which is being filed in Bankruptcy No. 60963-T concurrently with this petition; that she joined in and co-signed and executed the assignment, conveyances and transfers alleged in said petition to have been signed and executed by her husband; that the property transferred was the

community property of Jack P. Kalpakoff and your petitioner herein; and that your petitioner joins in and adopts as her petition in this matter all of the allegations in the petition of her husband Jack P. Kalpakoff.

Wherefore, your petitioner prays that Walter C. Durst, as such assignee, be directed to surrender and reconvey all of the property he now holds under the assignment for the benefit of creditors to your petitioner or to the trustee who may be appointed herein, and that your petitioner have such other and further relief as is just.

/s/ MARY KALPAKOFF,
Petitioner
/s/ SIEMON & SIEMON,
Attorney for Petitioner

Duly Verified.

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause 60963.]

ORDER TO SHOW CAUSE

At Los Angeles, in said District, on the 2nd day of June, 1954.

Upon the annexed petition of Jack P. Kalpakoff, the above named debtor, verified the 1st day of June, 1954, and sufficient reason appearing to me therefor, it is

Ordered that you, Walter C. Durst, show cause,

if any you have, before me in Room 323, United States Post Office and Court House Building, 312 N. Spring Street, Los Angeles, California, on the 9th day of June, 1954, at 10 o'clock in the forenoon of that day, or as soon thereafter as the matter can be heard, why you should not be required to turn over, release, reconvey and surrender to debtor or any trustee who may have been appointed herein such title, claims, liens, assignments and conveyances you have and/or hold from debtor as assignee for the benefit of his creditors of and upon the property of debtor described in Exhibit "A" attached to said petition, why you should not be required to release of record the crop mortgages referred to in said petition, why you should not be required to account, and why this court should not grant said debtor such other and further relief as is just.

You are notified that in the event you fail to show such cause the court will make such order in the premises as shall appear to be required by law and the facts.

This order and the annexed petition is directed to be served upon you at least five days prior to the return day hereon.

Dated: Los Angeles, California, June 2, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause No. 60964.]

ORDER TO SHOW CAUSE

[Printer's Note: Order to Show is same as in 60963 set out at pages 18-19 of this printed record.]

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Causes 60963-4.]

SPECIAL APPEARANCE BY RESPONDENT WALTER C. DURST

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Comes now the respondent Walter C. Durst, appearing specially, and respectfully alleges that the court is without jurisdiction to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, commenc-

ing with the General Assignment dated November 25, 1949, and all succeeding documents, denied by answer filed by Walter C. Durst, in pending Los Angeles Superior Court Action No. Transferred to Los Angeles SFC 914.

I.

Respondent without waiving any of his rights under the special appearance invites the court to consider the following:

(1) The appointment of an appraiser to appraise the two ranches of the debtors to determine the value of the interest of the debtors therein as resulting cestui que trust under the general assignment;

(2) The debtors' proposal to pay their secured creditors 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have an equitable interest other than the right to redeem from a sale before filing of their petitions herein.

Dated this 9th day of June, 1954.

/s/ WALTER C. DURST,
Respondent Appearing Specially

Acknowledgment of Service attached.

[Endorsed]: Filed June 9, 1954.

[Title of District Court and Causes 60963-4.]

SPECIAL APPEARANCE AND REQUEST FOR NOTICE OF ENTRY OF ORDERS

Under Rule 204-A of the District Court of Southern California Central Division

To the Honorable Benno M. Brink, Referee in Bankruptcy:

Walter C. Durst as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, hereby appears specially, for the purpose of requesting that he be given written notice by mail of the Entry of Orders in the above proceedings.

Dated this 8th day of June, 1954.

/s/ WALTER C. DURST,
Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Causes 60963-4.]

ORDER REQUIRING AND DIRECTING ASSIGNEE FOR THE BENEFIT OF CREDITORS TO DELIVER PROPERTY IN HIS POSSESSION

The Order to Show Cause directed to Walter C. Durst, as Assignee for the benefit of the creditors of the above named debtor, came on duly and regu-

larly for hearing before the undersigned Referee, at the hour of 10:00 o'clock a.m., June 9, 1954, at the Referee's Courtroom, in the Federal Building, Los Angeles, California. Alfred Siemon of Siemon & Siemon appeared on behalf of the debtor, and Walter C. Durst appeared in his own behalf by special appearance served on counsel and filed herein. Respondent presented argument on the points and authorities annexed to his special appearance; and the same were duly considered. The allegations of the Debtor's Petition, upon which the Order to Show Cause had been issued, were not controverted or denied; and said allegations are hereby found to be true.

Now, Therefore, in consideration of the premises, It Is Hereby Ordered that you, the said Walter C. Durst, within five (5) days after a certified copy of this Order shall have been served upon you, turn over and deliver to William Chernabaeff, Trustee herein, all property of the debtor in your possession or under your control which you acquired as Assignee for the benefit of creditors under, pursuant to and by the General Assignment for the Benefit of Creditors, dated November 25, 1949, a copy of which is attached to the Petition of the debtor to direct you, as Assignee for the benefit of creditors, to turn over property and served upon you with said Order to Show Cause; and that, to such end and for such purpose, you forthwith transfer and convey unto said Trustee all of your right, title and interest in and to the real and per-

sonal property hereinafter particularly described, to wit:

1. Real Property.

Parcel 1: The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of section 23, Township 9 North, Range 14 West, Kern County, California, a total of 240 acres.

Parcel 2: The Northwest quarter of Section 23, Township 7 North, Range 13 West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M described as follows: Beginning at the northwest corner of said Southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said Southeast Quarter 104 feet; thence West parallel with the North line of said Southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.

2. Ranch Equipment.

John Deere Disc; Model D John Deere Tractor No. 51391; No. 7 McCormick Deere Mower; Case Dump Rake; Ford Tractor & Mower; Border Fordson Disc; John Deere Side Del Rake; McDermott Bale Loader, Model 44, Ser. 554; John Deere Gang Plow; Horse; Harness; John Deere Plow, 16″ 2 way; John Deere Land Leveler; Case Baler; Oliver Baler; Truck; 1948 Ford Tractor No. 8N129697; Ford Tractor Air Cleaner, Dual Wheels;

Nowner Scraper, Dearborn Model 19-5, Ser. No. 3998; 1942 Ford Truck; Fairbanks Morse Pump w/A.C. Motor, 1-120 gal. tank, pipe and misc. fittings, pumps and pumping equipment; 10 L John Deere Killefer Hydraulic Landlever, Model AK Ser. 0052; No. 300, Atlas Hydraulic Power Control Unit; Be-Ge Hydraulic Carrying Scraper Ser. No. 51008, with Be Ge Pump and Dual Control Valve; LS400 John Deere Lindeman Landscraper, Ser. No. 0053; Allis Chalmers Tractor & Mower; Admiral Baler; Land Leveler home made; Power saw, Cauptman, 7″ wide, 1 H.P. motor; Ferguson Scraper and Border Disc. 1945; Hay Wagon; Thomas Drill; Drill Best; Brick Scraper, Towner; Fresno Scraper; International Tractor, Engine No. F.T.M.-1946, Ser. No. TAC 4055, Model T-40 Crawler, w/Dozer Blade; Hay Wagon, 1948; 9 Heifers; 2 Bulls; 2 Cows; 60 Sheep, ewes; Tank and Pump.

It Is Further Ordered that you forthwith deliver to the Trustee full and complete satisfaction of the promissory note in the principal sum of $90,000.00, and of the mortgage or mortgages of crops to be grown on the above described real properties executed by the debtor to you, as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper reference in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages.

Compliance with the above Order is directed and may be made by you by delivery of duly executed

conveyances and releases and satisfactions to this Court in the name of and for said Trustee within the time above stated.

You are further Ordered to account to this Court within thirty (30) days from the date this Order shall have been served upon you for the disposition by you of all receipts of money, things of value and any other property received by you as the Assignee for the benefit of creditors, as aforesaid.

Dated: June 15, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed June 15, 1954.

[Title of District Court and Causes 60963-4.]

PETITION FOR ORDER STAYING THE EXECUTION OF THE ORDER OF JUNE 15, 1954 RESPECTING CONVEYANCES AND RELEASES WITH ORDER

To the Honorable Benno M. Brink, Referee in Bankruptcy:

The petition of Walter C. Durst, respectfully represents and shows:

I.

That no order of confirmation of the debtors' plan of arrangement has been made and entered herein.

II.

That in the event there is no order of confirmation made and entered herein, and in the event petitioner should prevail in the hereinafter mentioned Superior Court Action, the execution of the order of June 15, 1954, made and entered herein by this court would destroy all of the rights of petitioner as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, and subject petitioner to great and irreparable damage and expose petitioner to suits for damages for waste of the assets of the general assignment, and possible personal liability. That as will hereinafter appear in the interest of Justice the execution of the said order respecting conveyances, releases, and the deprivation of petitioner of other rights should be stayed.

III.

That petitioner is the assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff by virtue of a general assignment dated November 25, 1949, grant deeds conveying title, bills of sale, promissory note secured by crop mortgages, all duly recorded, permanent assignment to the A. V. Hay Growers Association, dated on or about May 16, 1951, covering the Lancaster, California, ranch of the debtors, and permanent assignment to the A. V. Hay Growers Association, dated on or about April 29, 1953, covering the Rosamond, California Ranch of the debtors, together with other documents and instruments signed by the debtors

and as such assignee is by the admission of the debtors a secured creditor herein.

IV.

The Cancellation of the aforesaid documents is allegedly the subject of litigation in the Superior Court of Los Angeles County, Action No. Transferred to Los Angeles SFC 914, entitled Jack P. Kalpakoff and Mary Kalpakoff, plaintiffs, vs. Walter C. Durst, et al defendants, which said action is at issue as to the defendant Walter C. Durst, by answer filed in said action November 20, 1953 by said defendant Walter C. Durst.

V.

That the debtors herein have reserved all causes of action in said suit and propose in their plan of arrangement for the Trustee appointed by the Court herein to take over and be substituted for the debtors as plaintiff in the action against Walter C. Durst referred to in Amended Schedule A-2(7) and amended Schedule B-3, and prosecute same on behalf of the estate for cancellation of the assignment for benefit of creditors and for damages for fraud, neglect, nonperformance of duties and mismanagement of the assignee for the benefit of creditors, and to such end to file such amendments to the pleadings and initiate and prosecute such proceedings in said action as may appear to be required.

VI.

That by the aforesaid order made and entered

herein dated June 15, 1954, your petitioner is among other things ordered to transfer and convey unto the Trustee appointed herein by the Court all of petitioner's right, title and interest in and to the real property in said order described, and to deliver to the Trustee full and complete satisfaction of the promissory note and of the mortgages and mortgages of crops to be grown on the said real property executed by the debtors to Walter C. Durst as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper reference in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages.

VII.

That there is now pending before the Court the matter of the dismissal of these debtor proceedings which, if effected would destroy petitioner's rights unless the execution of the said order be stayed herein as aforesaid.

Wherefore your petitioner prays that an order be made and entered herein staying the execution of the order of June 15, 1954, as to all of the things and matters provided therein to be done by Walter C. Durst, assignee for the benefit of creditors, pending and until the order of confirmation of a plan of arrangement in these debtor proceedings becomes final, and should there be no order confirming plan of arrangement herein then the aforesaid order of June 15, 1954, shall become void and of no effect, and all provisions thereof to be carried out by the

said Assignee shall be cancelled and nullified and the assignee shall retain all rights which he had as such assignee prior to the filing of these debtor proceedings.

/s/ WALTER C. DURST,
Petitioner in Propria Persona.

Petition denied this 23rd day of June, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Causes 60963-4.]

PETITION FOR REVIEW OF ORDERS OF JUNE 15, 1954, AND JUNE 23, 1954

To Benno M. Brink, Referee in Bankruptcy:

The petition of Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff respectfully represents:

1. Your petitioner is aggrieved by the order herein of Benno M. Brink, referee in Bankruptcy, dated June 15, 1954, a copy of which order is annexed hereto, Marked Exhibit "A" and made a part hereof;

2. Petitioner is aggrieved by the order herein of Benno M. Brink upon petition for Order Staying

the Execution of the order of June 15, 1954 Respecting conveyances and releases with order, inscribed "Petition denied this 23rd day of June 1954," a copy of which petition and order is annexed hereto, marked Exhibit "B" and made a part hereof;

3. The referee erred in said order of June 15, 1954, in that he overruled the special appearance of petitioner whereby petitioner challenged the jurisdiction of the referee to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, commencing with the General Assignment dated November 25, 1949, and all succeeding documents;

4. The referee erred in that the matters alleged in the debtors' petitions and particularly the verified complaint attached thereto, are subject to the prior jurisdiction of the Superior Court of Los Angeles County, in pending Los Angeles Superior Court Action Filed April 23, 1953, being No. Transferred to Los Angeles SFC 914, entitled Jack P.

Kalpakoff and Mary Kalpakoff, plaintiffs vs. Walter C. Durst, et al., defendants, and at issue therein by answer filed November 20, 1953, by Walter C. Durst;

5. The referee erred in respect to the said order of June 15, 1954, and the order of June 23, 1954, in that, assuming but not conceding that the assumption of jurisdiction by the referee was proper, the said order of June 15, 1954 deprives the general assignment of its rights without due process of law, deprives the assignee for the benefit of creditors, a trustee, of his rights without due process of law, exposes the assets of the general assignment to waste, and exposes the assignee to liability therefor, by ordering reconveyances and releases and omitting to provide for the nullification of all action done or taken pursuant to said order, (1) in the event the within debtors' proceedings be dismissed, or (2) in the event no order of confirmation of arrangement be made and entered in these debtors' proceedings;

6. The referee erred in respect to the Order of June 23, 1954, by denying the relief sought for the protection and preservation of the general assignment in the event of dismissal of the debtor proceedings or the failure to enter an order confirming arrangement therein;

7. The referee erred in said order of June 15, 1954, in that he exceeded his jurisdiction by ordering the respondent to reconvey and release, an estate or interest greater than the estate or interest of

the debtors as beneficiaries of the general assignment to-wit, the estate or interest of resulting cestui que trust, and no more, upon the fulfillment of the general assignment through payment of all creditor beneficiaries, and expenses of administration through sale of the assets of the general assignment, subject only to delivery and accounting in the event of order confirming plan of arrangement; but not otherwise;

8. The referee erred at the hearing on June 9, 1954, in that he ruled in effect that District Court Rule 7 was inapplicable when he denied respondent's request that the proposed order of June 15, 1954, be submitted to respondent before same was signed by the referee;

9. The referee erred with respect to said order of June 15, 1954, in that he found that the allegations of the debtors' petitions were not controverted or denied;

10. The referee erred in the order of June 15, 1954, in that he found the allegations of the debtors' petitions to be true, and omitted to find that same were taken as true only by reason of the respondent's motion to dismiss;

11. The referee erred in the order of June 15, 1954, in that he omitted to recite in said order that the respondent had made a motion to dismiss, the grounds therefor; and the ruling thereon;

12. The referee erred in that he denied the respondent's motion to dismiss the Debtor's Petitions

and discharge the order to show cause which motion was made by petitioner on the ground that an express trust in lands created to pay the grantor's debts cannot be revoked without the consent of all the creditors for whose benefit it was created; nor can it be extinguished without the beneficiaries' consent, except by entire fulfillment, or by its object becoming impossible or unlawful; that the debtors' petitions did not state a cause of action for the relief sought, and that the identical issues were joined in the pending State court action;

13. The referee erred at the hearing of June 9, 1954, in that he omitted to rule upon respondent's motion that all of the creditor beneficiaries of the general assignment were proper parties respondent to the debtors' petitions and the orders to show cause thereon, and that the referee omitted to order same made respondents on his own motion;

14. The referee erred at the hearing of June 9, 1954, in that he ruled in effect that Rule 43c of the Federal Rules of Civil Procedure was inapplicable when he ruled upon respondent's offer of proof that the introduction into evidence of the documents upon which the respondent relies was unnecessary.

Wherefore your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that said order be reversed, and that the debtor's petition be dismissed as neither conferring jurisdiction or stating a cause of action prior to order of confirmation, and if same be found to be

within the jurisdiction of the court and to state a cause of action, that same be remanded for further proceedings in accordance with the order of the District Judge and for such other relief as may appear proper.

/s/ WALTER C. DURST,
Petitioner in Propria Persona.

Duly Verified.

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Causes 60963-4.]

CERTIFICATE OF FACTS SHOWING CONTEMPT IN PROCEEDINGS BEFORE REFEREE

To the Honorable Ernest A. Tolin, Judge of the District Court of the United States, Southern District of California, Central Division:

I, Benno M. Brink, Referee in Bankruptcy in the above entitled proceedings, upon petition of the above named debtors, after due notice to Walter C. Durst and after a hearing at which said Durst personally appeared specially in his own behalf and filed and presented objections to my authority in the premises and after said objections were disallowed made an order requiring said Durst to convey property of debtors held by him as their assignee for the benefit of creditors and to satisfy a certain promissory note and chattel mortgages given by debtors to Durst as security for the pay-

ment of debtors' creditors, all of which will more fully appear from a copy of said order hereunto attached in which I recited that I found all of the allegations of the petition to be true. The allegations in each of said matters were and are identical except for matters bearing on the relationship of debtors to each other; and I am attaching a copy of the petition in proceeding No. 60963-T, omitting exhibits attached thereto which were merely descriptive of the conveyances and property involved. At said hearing said Durst admitted, in response to my questions, that the subject property had been conveyed and said note and mortgages had been made to him as a general assignment for the benefit of the creditors of the debtors, and that he held no other claim or title to the property.

I therefore made said order, and a certified copy thereof in each of said matters was served upon him on June ...., 1954, and more than five days have expired since said service; and he, the said Durst, has not complied with said order in any respect whatever, has disobeyed and continued to disobey each and every requirement thereof.

Dated: July 7, 1954.

Respectfully submitted,

/s/ BENNO M. BRINK,
Referee in Bankruptcy

[Printer's Note: Order appearing here is set out at pages 22-26, Petition at page 10 of this printed record.]

[Endorsed]: Filed July 7, 1954.

[Title of District Court and Causes 60963-4.]

ORDER TO SHOW CAUSE WHY ASSIGNEE OF DEBTORS FOR BENEFIT OF CREDITORS SHOULD NOT BE ADJUDGED IN CONTEMPT AND COMMITTED UNTIL HE OBEYS LAWFUL ORDER

At Los Angeles, California, in said District and Division, on this 7th day of July, 1954.

The petition of William Chernabaeff, trustee in the above entitled matters, that the Referee certify the facts and issue an order under Sec. 41-B, having been heard at 10:00 o'clock a.m. on July 7, 1954, and due notice having been given by mail to Walter C. Durst, the assignee for the benefit of the creditors of the above named debtors, and after hearing Alfred Siemon, of the law firm of Siemon & Siemon, attorneys for the trustee, in favor of the petition, and said Durst in propria persona, in opposition thereto,

Now upon the petition of said trustee, and the answer of said Durst, and all the proceedings had before me at said hearing, and upon the Referee's certificate of facts under Sec. 41B, dated July 7, 1954, it is

Ordered that Walter C. Durst, the above named assignee, be, and he hereby is, required to appear before Ernest A. Tolin, Judge of the above entitled court, at Room 231, Federal Building, 312 North Spring Street, Los Angeles, California, on the 26 day of July, 1954, at 10 o'clock a.m. to show cause

why he should not be adjudged in contempt by reason of the facts certified in said certificate, and why he should not then and there be committed to prison or otherwise dealt with until he shall obey the lawful order of Benno M. Brink, Referee in Bankruptcy in these proceedings dated June 15, 1954; and it is further

Ordered that service of this order shall be deemed sufficient if a copy thereof and of the certificate dated July 7, 1954 be served on said Walter C. Durst on or before the 16 day of July, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy

Return on Service of Writ attached.

[Endorsed]: Filed July 21, 1954.

[Title of District Court and Causes 60963-4.]

PETITION BY ASSIGNEE FOR THE BENEFIT OF CREDITORS FOR AUTHORITY TO EMPLOY COUNSEL AT THE EXPENSE OF THE GENERAL ASSIGNMENT

To the Honorable Ernest A. Tolin, Judge of the United States District Court:

The petition of Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff respectfully represents and shows:

I.

That ever since the 25th day of November, 1949, petitioner has been and, subject to the effect of an order of June 15, 1954 herein, on review, still is, the assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, by virtue of recorded general assignment, recorded deeds, recorded bill of sale, recorded crop mortgages, and other unrecorded documents and agreements creating such trust known as general assignment (common law.), by virtue of which petitioner is a trustee, the primary beneficiaries of the trust are the creditors for whose benefit the trust was created, and the resulting beneficiaries being the debtors herein, who will participate in any residue after the payment of the creditors and the expenses of administration of the general Assignment.

II.

That the creditors and petitioner are defendants in Los Angeles Superior Court Action filed by the debtors as plaintiffs April 23, 1953, being No. Transferred to Los Angeles SFC 914, and which as to your petitioner has been at issue since November 20, 1953, by answer filed that day in propria persona.

III.

That the within debtor proceedings were filed by the debtors in propria persona to avoid pending foreclosures of the two ranches which the debtor have been operating for the general assignment for

four years by written agreement as the agents of the assignee for the benefit of creditors.

IV.

That the aforesaid order of June 15, 1954, entered after a hearing on June 9, 1954, in which your petitioner appeared in propria persona, being in the opinion of your petitioner a premature and void order under the provisions of Section 475 of the Bankruptcy Act as no plan of Arrangement has been confirmed. Your petitioner in propria persona reviewed said order on the day he was ordered to convey and release the assets of the general assignment. Whereupon petitioner appeared in propria persona on July 7, 1954, and his acts and conduct were cited to the District Judge.

V.

In the event of a judgment in the State Court requiring petitioner to sell the assets and pay the creditors the said order of June 15, 1954, could make it impossible to respond to said State Court Judgment, possibly causing great and irreparable damage to the creditors of the general assignment. Furthermore the debtors employed counsel herein and on or about May 26, 1954, filed amended schedules herein where allegedly the creditors of the general assignment are listed in schedule 3a Unsecured creditors.

VI.

That is necessary in view of the proceedings had herein and for the preservation of the general as-

signment, and the protection of the assets and the interest of the creditors for whose benefit same was created, and the protection and preservation of all contractual rights heretofore entered into, that counsel Morris Lavine, who has been employed, be approved by the Court, and designated as counsel for the assignee, with court approval. Petitioner has already had the benefit of the services and advice of attorney Morris Lavine as such counsel, who has agreed to accept as compensation for any services rendered to your petitioner such amount as may be allowed from time to time therefor by this Court.

Wherefore your petitioner prays that he be authorized and directed to employ counsel at the expense of the general assignment.

/s/ WALTER C. DURST,
Assignee for the Benefit of the Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

Duly Verified.

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Causes 60963-4.]

ORDER APPOINTING ATTORNEY FOR THE ASSIGNEE FOR THE BENEFIT OF CREDITORS

It appearing that Walter C. Durst is the assignee for the benefit of creditors of Jack P. Kalpakoff

and Mary Kalpakoff. That on the 15th day of June, 1954, the court made an order to convey and release all the assets of the general assignment;

It appearing that Walter C. Durst appeared in such matter in propria persona, and that he has been cited to show cause in contempt for not complying with the order;

It appearing to the Court that Walter C. Durst, in his capacity as assignee for the benefit of creditors requires counsel, now therefore,

It Is Ordered that Morris Lavine, Esquire, be, and he is hereby, appointed at the expense of the estate included in the general assignment for the benefit of creditors, to serve as attorney for Walter C. Durst in his capacity as assignee for the benefit of creditors in all matters related to the trust created under such general assignment.

Dated this 22 day of July, 1954.

/s/ ERNEST A. TOLIN,
Judge of the U. S. District Court

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Causes 60963-4.]

PETITION FOR ORDER SETTING ASIDE ORDER OF GENERAL REFERENCE

To the Honorable Ernest A. Tolin, Judge of the United States District Court:

The petition of Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff

and Mary Kalpakoff, respectfully represents and shows:

I.

That there have been several matters set before the Hon. Judge Ernest A. Tolin, for hearing on July 26, 1954, at 10:00 o'clock in the above entitled debtor estates to wit:

1. An order to show cause why Walter C. Durst should not be held in contempt.

2. Opposition to a real property plan of arrangement now proposed by the debtors.

3. Plan of arrangement proposed by the assignee.

4. The appointment of counsel for the assignee.

5. The consolidation of the cases.

6. A petition on behalf of the assignee to file one claim for all creditors of the general assignment.

7. Petition for review has been filed and is pending involving the same subject matter.

II.

That in the opinion of the petitioner the issues raised by the petition for review herein from the order of June 15, 1954, made and entered herein by the referee, are of such a nature, that in the interest of avoiding a multiplicity of suits, and a duplication of judicial work, the order of general reference heretofore made and entered herein, should be set aside and all matters pending before the referee be transferred to this Honorable Court in the interest of justice, and that the hearing now set for July

28, 1954, before the referee be transferred to the calendar of the District Judge.

Wherefore your petitioner prays that this court make its order that the general reference heretofore made be set aside and all matters pending or hereafter arising be transferred to this court for further hearing before this Honorable Court and the District Judge thereof.

/s/ WALTER C. DURST,
Assignee for the Benefit of Creditors

This petition will be heard September 13, 1954, at 10 a.m.

/s/ ERNEST A. TOLIN, Judge

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Causes 60963-4.]

SPECIAL APPEARANCE

Proceedings on an Order to Show Cause Why Assignee Should Not Be Held For Contempt in a Chapter XII Proceeding; Denial of Acts Constituting Contempt; Challenge to Order as Null and Void; Opposition to Proposed Plan of Arrangement.

Comes Now Walter C. Durst, as Assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, and in response to the Order to Show Cause Why he, as

assignee for the benefit of the creditors, should not be adjudged in contempt of the Order of the Referee in Bankruptcy and committed until he obeys the said order, respectfully responds that he is not guilty of contempt. He further responds that (1) he has committed no act for which he would be punished or held in contempt; (2) that the order of the Referee in Bankruptcy is null and void and therefore not subject to an order of contempt.

In respect thereto he sets forth as follows:

The Facts

I.

On November 25th, 1949, Jack P. Kalpakoff and his wife, Mary Kalpakoff, who were represented by Attorney Philip M. Schwabacher, attorney-at-law, with offices in Lancaster, California, and fully advised at that time by said attorney, executed a General Assignment for the benefit of creditors (common law) naming this respondent as the Assignee. That at that time the Kalpakoffs had suffered heavy losses during the year 1949 in their crop in a potato venture with one John Chernabaeff. There was at that time a large payment due on December 1st, 1949 on Kalpakoff's 240-acre ranch at Rosamond, in Kern County, California; creditors who had performed labor and sold materials in the development of the ranch and the leveling of the land, the installation of a well and installation of pipes on approximately 120 acres were threatening legal action, and the Los Angeles Production Credit Association was also threatening foreclosure on Kalpakoff's

160-acre ranch at Lancaster, Los Angeles County, California. Mr. Kalpakoff stated that he wanted to remain in possession of the land for the purpose of farming it and to keep these creditors from selling him out so that farming could continue, the crops could be sold, and provide a fund from which he believed the creditors could be paid in full. With the advice of Mr. Schwabacher he chose the Common Law Assignment for the benefit of Creditors to carry on.

II.

Pursuant to the general assignment, Mr. and Mrs. Kalpakoff delivered all of their assets to the assignee for the benefit of the creditors and conveyed the same by appropriate instruments of conveyance in conformity with applicable law of general assignments to make the instruments valid. They remained in possession under an agreement as the assignee's agents.

III.

The general assignment was recorded in Book 31667, Page 84, in the Official Records of Los Angeles County, being Exhibit "A" attached to this Order in Response. Agreement re Assignee's Fees is Exhibit A-1 Attached hereto.

IV.

Deeds to three city parcels and Los Angeles County ranch were recorded in Book 31667, Page 86 of the Official Records of Los Angeles County, California, on December 7, 1949.

V.

The deed to the Kern County land, consisting of 240-acres at Rosamond, was recorded in Book 1804, Page 146, Official Records of Kern County, California, on May 3, 1951.

VI.

A Bill of Sale was recorded in Book 35500, Page 235, Official Records of Los Angeles County, California, on February 6, 1951.

VII.

A promissory note for $95,000.00, being the total of the then indebtedness of the Kalpakoffs, was delivered to the assignee, as were an agreement designating the Kalpakoffs as the agents of the assignee and respecting the possession of the assets of the General Assignment and agreement respecting fees of the assignee for his services.

VIII.

A crop mortgage on Los Angeles County land was recorded in Book No. 31167, Page 78, Official Records of Los Angeles County, California, on December 7, 1949.

IX.

A crop mortgage on the Kern County land was recorded in Book No. 2044, Official Records, Kern County, California, on February 24, 1953.

X.

The aforesaid assignments conveyed an absolute and irrevocable trust in the assignee, your petitioner herein, for the benefit of creditors.

XI.

Notice was given to each and all of the creditors, pursuant to applicable law. There were no objecting creditors.

XII.

Jack P. Kalpakoff and Mary Kalpakoff have proceeded under this assignment for the benefit of creditors rather than bankruptcy on a proposal by John Chernabaeff, the largest creditor, by which proposal the assignee is informed and believes Mr. Chernabaeff was to receive a deed to Rosamond, Kern County 240-acre ranch, and permit Mr. Kalpakoff to work on the ranch and if at the end of three years he was in a position to repay John Chernabaeff in full, Mr. Kalpakoff would receive back the deed to the ranch, and a proposal from the Los Angeles Production Credit Association, the holder of the second deed of trust on the Lancaster land, 160-acre ranch then in default, that as the assignee is informed and believes, Mr. and Mrs. Kalpakoff deed that ranch to the association and if, during a specified period of time, Kalpakoff was able to repay the association, he would receive back a deed to the ranch.

XIII.

The general assignment for the benefit of creditors given to the Assignee, Walter C. Durst, would have constituted an act of bankruptcy under Section III(4), Title Eleven, Chapter 3, Section 21 of the Bankruptcy Act, and, except for the fact that the Kalpakoffs are farmers, a petition could have been filed at any time within four months after the com-

mission of the act of bankruptcy to declare Mr. and Mrs. Kalpakoff bankrupt. The creditors who were all placed upon notice elected to along with the common law assignment for the benefit of creditors, and did not protest.

XIV.

Thereafter, pursuant to the general assignment and the contracts therein entered, their assignee has proceeded for the past five years to carry out his duties; he has reduced the incumbrance holder and equipment contract indebtedness on both ranch properties from approximately $70,000 to about $45,000. He entered into obligations with the consent of the debtors for the benefit of the creditors and others as follows:

(A) "Obligations have been contracted, with the consent of the debtors, for the benefit of the creditors and the debtors, to the best of my knowledge, about as follows: A. V. Hay Growers Association, $357.80, Associated Telephone Co., $80.02, Bank of America, Lancaster, plus interest, $205.00, Director of Internal Revenue, plus charges and interest, $842.91, Walter C. Durst, advances $777.58, John French $56.67, Harris Store, $164.67, H. W. Hunter, $302.93, Abraham P. Kalpakoff, $1,500.00, George J. Kalpakoff, $350.00, Jack J. Kalpakoff $80.00, John Kalpakoff $500.00, Paul Kalpakoff $200.00, Mary William Kalpakoff, $100.00, William Kalpakoff, plus interest, $3,062.11, William Kalpakoff and John Chernabaeff, $105.00, Fred Kraft, $58.85, L. A. Daily Journal, $58.30, McGowan & Swan, $55.14, Newell & Co., $123.02, and $478.56,

Milan A. Pond, $50.00, Robertson Implement Co., $30.00, John Samaduroff, $500.00, P. M. Schwabacher, $38.90, Chas. F. Siebenthal, $108.77, So. Calif. Water Co., $3.88, Westside Farmer's Supply Co., $16.50; P. Bonnafus, $25.00, Paul W. K. Hairgrove, $50.00, George J. Kalpakoff $125.00, Gregory Kalpakoff, $375.00, John J. Kalpakoff, $125.00, Paul F. Kalpakoff, $100.00, John Nazareff, $25.00, Bill Samaduroff, $125.00, which apparently total approximately $11,156.61.

(B) "Prior secured creditors existing when I took the general assignment November 25, 1949 are as follows: J. Perry Brite, plus interest $1,-972.21, Lysle Greenman, plus interest $18,000.00, Los Angeles Production Credit Association, plus interest $19,773.12, Peerless Pump Division plus interest $2,028.20, Pomona Pump Sales plus interest, $173.60, Shepherd Tractor and Equipment Co., $2,187.14, Standard Oil Co., $32.00, making a total of approximately $44,166.27.

(C) "That the debts for the payment of which I took the general assignment have not been paid as follows: Fred A. Alley Co., $215.03, Antelope Valley Pest Control Co., $75.00, Mike J. Bolotin, $200.00, Dr. Hugh C. Bryan, $3.00, Dr. Craig B. Byrne, $8.00, California Farm Supply Co., $171.00, Don Campbell Electric, $6.91, John Chernabaeff, $8,863.12, W. O. Coleman, $2,300.00, Cuthrie Collins, $.25, Del R. Combs, $407.82, Dr. L. M. Cowell, $8.00, Dent Dustin, $51.00, John Evdakimoff, $410.40, Robert W. Fugitt, D.D.S., $4.00, General Petroleum Corp., $704.50, Joe Goddle, $150.00, Guarantee In-

surance Co., $126.14, Hayward Lumber & Inv. Co., $276.64, Dr. George A. Johnstone, $3.00, George J. Kalpakoff, $100.00, Jack J. Kalpakoff, $1,100.00, John J. Kalpakoff, $1,400.00, Paul F. Kalpakoff, $600.00, Paul P. Kalpakoff, $100.00, H. E. Kicenske, M.D., $33.00, John M. Krauss, M.D., $10.00, Lincoln Medical Pharmacy, $11.50, Martinez Brothers, $2,667.20, McGowan & Swan, $4,265.33, Nunz Bros., $122.91, Pickus Bros. Repair Service, $14.88, Richfield Oil Corp. $39.52, Rottman Drilling Co., $299.20, Bill Samaduroff, $500.00, John Samaduroff, $500.00, Robert J. Schillinger, M.D. $20.00, P. M. Schwabacher, $2,169.00, John Selznoff, $300.00, W. R. Senseman, M.D., $3.00, Charles F. Siebenthal $290.42, Standard Oil Co., $221.29, Suburban Gas Service $10.46, Valley Tire Shop, $47.57, San Volkoff, $250.00, Westside Farmers Supply Store, $338.26, Westside Service, $22.65, Al Wren, $105.00, Jerry R. Young, $55.50, apparently totalling approximately $31,537.17.

XV.

During the first year of the general assignment the gross receipts were approximately $21,708.81, including the 1950 production of the Lancaster ranch of approximately $11,416.81, and from which approximately $13,949.30 was paid to secured creditors, and the assignee paid himself $787.43; the second year gross receipts were approximately $31,-988.20, including the 1951 production of the Lancaster Ranch of approximately $15,608.55, of which approximately $20,476.54, was paid to secured creditors and the assignee paid himself the sum of

$625.00; the third year gross receipts were approximately $31,951.88, including the 1952 production of the Lancaster ranch of approximately $17,780.96, of which approximately $14,671.42 was paid to secured creditors and the assignee paid himself $735.00; the fourth year gross receipts were approximately $8,383.45, of which approximately $11,934.58 was paid to secured creditors, and the assignee paid himself $200.00. During the first three years the assignee, on the advice of creditors, leased the Kern County ranch, but during 1953 the debtors attempted to operate both ranches, meanwhile the alfalfa beds on the Lancaster ranch were depleted.

XVI.

The defaults of the trust deed holders were cured by December 1st, 1952. However, after three years, the general creditors having received no money became dissatisfied and urged the sale of at least one ranch to pay the obligations; they had in good faith relied upon the assignment for the benefit of creditors and had consented and agreed to rely upon the general assignment, and had therefore taken no legal action within the statutory time upon their claims. During all of this time the assignee dealt under his trust powers at arm's length with the assignor, the debtors.

XVII.

Walter C. Durst, as assignee, had the debtors' written approval to sell the property and, in 1953, started and negotiated a sale of the Kern County property for the sum of $70,000.00 to Dr. John

C. Siemens, in order to make disbursements to the general creditors. This was his legal duty (See American Jurisprudence on Assignment for the benefit of creditors.)

XVIII.

In order to block this sale, suit was filed (in 1953) in the Superior Court of the State of California, being action No. S.F.C. 914, Transferred to Los Angeles in the Superior Court of the State of California in and for the County of Los Angeles, in which Jack P. Kalpakoff and Mary Kalpakoff, as plaintiffs, sought, and are seeking, to set aside the general assignment and the cancellation of all supporting documents, and filed les pendens in the recorder's office, thus clouding the assignee's title and blocking the proposed sale. That suit is now at issue and has not been tried, and involves the identical subject matter involved in these proceedings, and has for its main purpose the prevention and blocking of the sale by the assignee of the properties herein involved, or one of them, to pay off the creditors for whose benefit the assignee took the assignment.

XIX.

On April 28th, 1954, Jack P. Kalpakoff and Mary Kalpakoff, debtors, filed a Petition under Chapter XII of the Bankruptcy Act, alleging that they had an equitable interest in the properties assigned for the benefit of creditors and, later, proposing a Plan of Arrangement by which they proposed to cancel the general assignment for the benefit of creditors and all instruments in connection therewith, and to

take possession of the properties heretofore assigned. Its purpose was to stop foreclosure sale of the ranch properties.

No hearing has been had upon the confirmation of the said Plan and no confirmation has been had of the Plan thus proposed, and no determination has been made by the Court that it is satisfied that the provisions of Chapter XII have been complied with or that the plan is for the best interest of creditors and is feasible, or that the debtors have not been guilty of any of the acts, or failed to perform any of the duties which would be a bar to the discharge in bankruptcy, or that the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by the Bankruptcy Act; nor that all payments made or promised by the debtors, or by any person issuing securities or acquiring property under the arrangement, or by any other person, for services and for costs and expenses in, or in connection with, the proceedings, or in connection with and incident to the arrangement have been fully disclosed to the court and are reasonable, or if to be fixed after confirmation of the arrangement will be subject to the approval of the court. (See Chapter XII Bankruptcy Act.) After such hearing and confirmation, Section 475 of the Bankruptcy Act permits the Court to Order appropriate instruments to be executed.

XX.

Without such hearing and opportunity to object, and without notice to the creditors, and without con-

firmation of the plan, the Referee in Bankruptcy, on June 15th, 1954, issued an Order to the Assignee requiring and directing him to assign and convey the two ranch properties and all other property in his possession; that in addition to the two ranch properties, the assignee as of such date had less than $100.00 in his possession for the benefit of such creditors.

The Order of June 15th, 1954, directed the assignee to

> "transfer and convey unto said Trustee (in bankruptcy) all of your right, title and interest in and to the real and personal property hereinafter particularly described,"

and to

> "forthwith deliver to the Trustee full and complete satisfaction of the promissory note in the principal sum of $90,000.00 and of the mortgage or mortgages of crops to be grown on the above described real properties executed by the debtor to you, as Assignee for the benefit of creditors, on or about November 25, 1949, as security for the payment of said note, with proper references in said releases and satisfactions reciting the dates and places of recordation of each of said crop mortgages."

The order further provided that:

> "Compliance with the above Order is directed and may be made by you by delivery of duly executed conveyances and releases and satisfactions to this Court in the name of and for said Trustee within the time above stated." (an ex-

act copy of the order is attached herewith and made a part hereof, as Exhibit "B").

Said order is null and void as not in compliance with Section 475 of the Bankruptcy Act, since no Plan of Arrangement has been heard on notice, nor confirmed, and until a Plan is heard and confirmed the Referee was, and is, without jurisdiction to make the order.

XXI.

Walter C. Durst, as Assignee for the benefit of the creditors, addressed Honorable Benno M. Brink re Kalpakoff Debtors' Estate Nos. 60963-T and 60964-T, declining to carry out the aforesaid orders and set forth that:

> "I am in this thing in a trust capacity. I am not a free agent. I have a duty both to the creditors and the debtors. I took it for the creditors' benefit. The creditors decline to release me."

And, after setting forth the various claims, he set out:

> "I believe my primary duty is to the creditors, and the debtors' rights come in only after the creditors claims have been satisfied. I am in litigation in the state court, and it took jurisdiction first and I am going to have to comply with its judgment, including a judgment not to convey to the debtors, but to sell for the benefit of the creditors.
>
> The jurisdiction of the referee extends to the making of an order confirming a plan of arrangement which will be binding on my prim-

ary beneficiaries and likewise on the debtors, and I will be delighted to comply because that order will be binding on all parties including the debtors, the creditors, and will, incidentally, enjoin the state court from further proceedings.

Upon such an order I will be happy to convey and release to the Trustee or other person designated by the court to carry out the plan of arrangement.

Thank you again for the help you have given me.

Most respectfully,

Walter C. Durst,

Assignee for the benefit of the creditors of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment."

(An exact copy of the letter of Walter C. Durst to the Referee is attached hereto and made a part hereof, as Exhibit "C".)

XXII.

The said Walter C. Durst, on April 23, 1954, also took a Petition for Review of the Referee's Order to the District Court of the United States, and such a petition acted as a stay and removed jurisdiction from the Referee to make any order with reference thereto.

XXIII.

On July 7, 1954, the Referee in Bankruptcy certified an Order to the District Court of the United States to show cause why Walter C. Durst

should not be held in contempt of court for disobeying his order. (A copy of said Order being in the files hereof, is made a part hereof as fully as though set out in this response.)

The respondent herein, Walter C. Durst, respectfully responds that, under the foregoing facts, he was not and is not in contempt and is not required to obey the order of the Referee in Bankruptcy and the order to show cause should be discharged for the following reasons:

1. The order was and is void and a nullity for the reason that the Referee has no jurisdiction to make such an order until a Plan of Arrangement has been confirmed, as required by Section 475 of the Bankruptcy Act. (11 U.S.C. 875). That before the Referee can make an Order it is necessary for him to hold a hearing to determine whether a proposed Plan of Arrangement can and should be confirmed, after notice to the creditors and a chance by the creditors and all parties in interest to object to such a proposed plan of arrangement.

No plan has been confirmed. Presently, objections have been made to the Proposed Plan as not feasible, and another Plan has been submitted by the Assignee.

Upon a hearing to determine whether any plan should be confirmed or the proposals dismissed, your respondent will show that the proposed plan of the debtor is against the best interests of the creditors; that, in fact, the creditors have relied upon the gen-

eral assignment for the benefit of creditors to forego their right to bring suit within the statutory time fixed by the Statute of Limitations and that the claims of several of them would therefore be wiped out with no possibility of legal redress; that they will show that there is a valid, binding contract between them and the assignee for whose benefit the assignment was taken; they will show that they would be highly and greatly prejudiced and payment of their claims (now several years old) would be further delayed; they have now waited for years for the payment of their money, relying upon the general assignment. They will further show that the proposed plan of the debtor is not in good faith, but is solely for the purpose of preventing the sale of one or more of the ranch properties to pay off the long overdue indebtedness and to allow them to continue to remain in possession of the property which they have now remained in possession of for almost five years since the commencement of these proceedings, and at a time when the incumbrance holders and equipment contract creditors could have foreclosed on their property, and that in this respect the proposed plan would be inequitable and against the best interests of the creditors.

There now being no confirmation of the arrangement, as required by Section 475 of the Bankruptcy Act, the Court was without jurisdiction to direct the Assignee to execute and deliver the instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed.

Jurisdiction of the Referee to make the order in question does not vest until after an arrangement has been confirmed, after notice and hearing by the creditors—none of which has been had.

Confirmation of a plan must receive a full hearing, as provided by Section 471 of the Bankruptcy Act. Without notice and without a hearing on the proposed Plan of Arrangement for the purpose of confirmation, the proceedings would be in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and a nullity.

Sylvan Beach vs. Koch, 140 Fed. 2d 852, at 861:

"In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity. Galpin vs. Page, 85 U. S. 350, 18 Wall. 350, 368, 369, 21 L.Ed. 959; Windsor vs. McVeigh, 93 U.S. 274, 277, 278, 23 L.Ed. 914; Coe vs. Armour Fertilizer Works, 237 U.S. 413, 423, 35 S.Ct. 625, 59 L.Ed. 1027; Twining vs. State of New Jersey, 211 U.S. 78, 110, 111, 29 S.Ct. 14, 53 L.Ed. 97; Ochoa vs. Hernandez, 230 U.S. 130, 161, 33 S.Ct. 1033, 57 L.Ed. 1427; Postal Telegraph Cable Co. vs. City of New Port, 247 U.S. 464, 476, 38 S.Ct. 566, 62 L.Ed. 1215; Truax vs. Corrigan, 257 U.S. 312, 332, 42 S.Ct. 124, 66 L.Ed. 254, 27 A.L.R. 375; Gentry vs. United States, 8 Cir. 101 F. 51; In re Rosser, 8 Cir., 101 F. 562, 567, 570; In re Noell, 8 Cir., 93 F. 2d 5, 6, 7."

In re American Bantam Car Co., 193 F.2d. 616, at 621, the court said:

"Unless notice be given as required by the bankruptcy act, the court lacks the power to enter a valid order in the premises."

Until there has been a hearing on a plan of arrangement, after notice to all of the creditors and a confirmation thereof, the Referee in Bankruptcy lacked jurisdiction to make the order and the order was a nullity. No contempt is committed in refusing to obey a void order.

2. The order was and is a nullity also for the reason that the debtors actually do not have, and have not shown to have, any "equitable interest" in the real property involved, except as resulting beneficiaries, and therefore are improperly in a Chapter XII proceeding. Having, by their general assignment for the benefit of creditors, conveyed all of their assets to the assignee for the benefit of the creditors, they have created an irrevocable trust and conveyed all of their property to the assignee for the benefit of creditors and thus, until it is shown that all of the debts have been fully paid, that all the creditors are paid in full pursuant to the assignment, the assignor retains no interest whatsoever in the properties thus assigned and the allegations of equitable interest therein are incorrect as a matter of law.

The right to set aside such assignment of property transferred by such assignment almost five

years prior to the petition, and under which the creditors have been relying in good faith upon the general assignment, does not exist under applicable law.

3. The debtors, in fact, have no equitable interest and can have none until the terms of the general assignment for the benefit of the creditors is carried out and it is shown that there is a balance left. The only interest that the debtors had in this property was an agreement that they may remain in possession and farm it. This does not entitle them to proceed under Chapter XII.

4. The debtors have selected the state court forum first; they selected it to bring a plenary suit to set aside their general assignment. That suit is now pending. The state courts have taken first jurisdiction—the federal courts have no jurisdiction or right to interfere.

5. The debtors have not offered to do equity as required by equitable principles on which bankruptcy court are governed. To do equity, each of the creditors should be paid in full and all contractual rights agreed upon by the general assignment and in connection therewith should be carried out. Any proposal or plan carries a duty to the creditors and to the assignee for their benefit. Any proposal should require the creditors to release the assignee for their benefit and to release the assignee from any judgment in the state court which took jurisdiction first, and to comply with its judgment including a judgment not to convey to the debtors but to sell for the benefit of creditors, which may

be determined in that action, and to release the assignee from all obligations resulting from the contracts entered into by all the parties, in 1949.

6. The Trustee William Chernabaeff who has been appointed is a relative of the debtors and not a disinterested Trustee.

7. The debtors are estopped by their acts and their conduct in seeking the setting aside of the assignment for the benefit of creditors after nearly five years of operation under it, and after reliance by the creditors upon such acts and such conduct. Laches has set in. If they wished to set it aside, they had to act within a reasonable time.

8. A petition for review stays the Order of the Referee and he is without jurisdiction to certify a contempt proceeding until the matters set out in the Petition for Review are decided by the United States District Court.

Wherefore, respondent, Walter C. Durst prays that this Honorable Court discharge the Order to Show Cause, and that he order the payment of all costs out of the estate and assets of the debtors, including attorneys fees and expenses for the said assignee.

/s/ MORRIS LAVINE,
Attorney for Assignee Appearing Specially

[Printer's Note: Exhibit A, General Assignment and A-1, Agreement re Fees are set out as Exhibits B and C at pages 14-17.]

EXHIBIT "C"

Law Offices Walter C. Durst, 639 S. Spring St., Los Angeles, Calif.

(Copy) July 7th, 1954

Honorable Benno M. Brink, Referee in Bankruptcy 327 Federal Building, 312 North Spring Street, Los Angeles 12, California.

Re: Kalpakoff Debtor Estates, Nos. 60963-T and 60964-T.

Honorable Sir:

I am in this thing in a trust capacity. I am not a free agent. I have a duty both to the creditors and the debtors. I took it for the creditors' benefit. The creditors decline to release me.

Prior secured creditors existing when I took the general assignment November 25, 1949, are as follows: J. Perry Brite, plus interest, $1972.21, Lysle Greenman, plus interest $18,000.00, Los Angeles Production Credit Association, plus interest $19,-773.12, Peerless Pump Division, plus interest $2,-028.20, Pomona Pump Sales plus interest, $173.60, Shepherd Tractor and Equipment Co., $2,187.14, Standard Oil Co., $32.00, making a total of approximately $44,166.27.

Obligations have been contracted, with the consent of the debtors, for the benefit of the creditors and the debtors, to the best of my knowledge, about as follows: A. V. Hay Growers Association, $357.80, Associated Telephone Co. $80.02, Bank of America, Lancaster, plus interest, $205.00, Director of Internal Revenue, plus charges and interest, $842.91,

Walter C. Durst, advances, $777.58, John French, $56.67, Harris Store, $164.67, H. W. Hunter, $302.93, Abraham P. Kalpakoff, $1,500.00, George J. Kalpakoff, $350.00, Jack J. Kalpakoff, $80.00, John Kalpakoff, $500.00, Paul Kalpakoff, $200.00, Mary William Kalpakoff, $100.00, William Kalpakoff, plus interest, $3,062.11, William Kalpakoff and John Chernabaeff, $105.00, Fred Kraft, $58.85, L. A. Daily Journal, $58.30, McGowan & Swan, $55.14, Newell & Co., $123.02, and $478.56, Milan A. Pond, $50.00, Robertson Implement Co., $30.00, John Samaduroff, $500.00, P. M. Schwabacher, $38.90, Chas. F. Siebenthal, $108.77, So. Calif. Water Co., $3.88, Westside Farmer's Supply Co., $16.50, P. Bonnafaus, $25.00, Paul W. K. Hairgrove, $50.00, George J. Kalpakoff, $125.00, Gregory Kalpakoff, $375.00, John J. Kalpakoff, $125.00, Paul F. Kalpakoff, $100.00, John Nazareff, $25.00, Bill Samaduroff, $125.00, which apparently total approximately $11,156.61.

That the debts for the payment of which I took the general assignment have not been paid as follows: Fred A. Alley Co., $215.03, Antelope Valley Pest Control Co., $75.00, Mike J. Bolotin, $200.00, Dr. Hugh C. Bryan, $3.00, Dr. Craig B. Byrne, $8.00, California Farm Supply Co., $171.00, Don Campbell Electric, $6.91, John Chernabaeff, $8,-863.12, W. O. Coleman, $2,300.00, Cuthrie Collins, $.25, Del R. Combs, $407.82, Dr. L. M. Cowell, $8.00, Dent Dustin, $51.00, John Evdakimoff, $410.40, Robert W. Fugitt, D.D.S., $4.00, General Petroleum Corp., $704.50, Joe Goddle, $150.00, Guarantee

Insurance Co., $126.14, Hayward Lumber & Inv. Co., $276.64, Dr. George A. Johnstone, $3.00, George J. Kalpakoff, $100.00, Jack J. Kalpakoff, $1,100.00, John J. Kalpakoff, $1,400.00, Paul F. Kalpakoff, $600.00, Paul P. Kalpakoff, $100.00, H. E. Kicenske, M.D., $33.00, John M. Krauss, M.D., $10.00, Lincoln Medical Pharmacy $11.50, Martinez Brothers, $2,667.20, McGowan & Swan, $4,265.33, Nunz Bros., $122.91, Pickus Bros. Repair Service, $14.88, Richfield Oil Corp. $39.52, Rottman Drilling Co., $299.20, Bill Samaduroff, $500.00, John Samaduroff, $500.00, Robert J. Schillinger, M.D., $20.00, P. M. Schwabacher, $2,169.00, John Selznoff, $300.00, W. R. Senseman, M.D., $3.00, Charles F. Siebenthal, $290.42, Standard Oil Co., $221.29, Suburban Gas Service, $10.46, Valley Tire Shop, $47.57, San Volkoff, $250.00, Westside Farmers Supply Store, $338.26, Westside Service, $22.65, Al Wren, $105.00, Jerry R. Young, $55.50, apparently totalling approximately $31,537.17.

I believe my primary duty is to the creditors, and the debtors' rights come in only after the creditors claims have been satisfied. I am in litigation in the state court, and it took jurisdiction first and I am going to have to comply with its judgment, including a judgment not to convey to the debtors, but to sell for the benefit of the creditors.

The jurisdiction of the referee extends to the making of an order confirming a plan of arrangement which will be binding on my primary beneficiaries and likewise on the debtors, and I will be delighted to comply because that order will be bind-

ing on all parties including the debtors, the creditors, and will, incidentally, enjoin the state court from further proceedings.

Upon such an order I will be happy to convey and release to the Trustee or other person designated by the court to carry out the plan of arrangement.

Thank you again for the help you have given me.

Most respectfully,

WALTER C. DURST,

Assignee for the benefit of the creditors of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment

WCD—d.

Duly Verified.

[Endorsed]: Filed July 26, 1954.

[Title of District Court and Causes 60963-4.]

REFEREE'S CERTIFICATE ON PETITIONS FOR REVIEW OF ORDERS REQUIRING ASSIGNEE TO TURN OVER PROPERTY

To the Honorable Ernest A. Tolin, Judge of the above entitled Court:

I, Benno M. Brink, one of the Referees in Bankrutcy of said court, before whom the above-entitled matters are pending under orders of general reference, do hereby certify to the following.

Walter C. Durst has duly filed his identical peti-

tions for the review of identical orders made by your Referee on June 15, 1954, in the above-entitled matters, in which orders the said Walter C. Durst was required to turn over to the trustee in these proceedings the property held by him under a general assignment for the benefit of the creditors of the debtors in these matters. The said petitions for review also challenge the propriety of orders made in these proceedings on June 23, 1954, denying a stay of execution of the said orders of June 15, 1954.

The Proceedings

On April 28, 1954, the debtors herein filed their respective petitions under Chapter XII of the Bankruptcy Act in these matters. On June 9, 1954, William Chernabaeff was duly appointed as trustee in each of these cases and he thereafter qualified as such trustee.

On June 2, 1954, the debtors filed their respective petitions praying that the aforesaid Walter C. Durst be directed to surrender to the debtors or to the trustee in these proceedings all property held by him under an assignment for the benefit of creditors. On the same day orders to show cause were issued requiring the said Walter C. Durst to show cause why the said petitions should not be granted.

On June 9, 1954, the said Walter C. Durst filed in each of these cases a special appearance in which he alleged that the court was without jurisdiction in these proceedings to grant the relief prayed for in the aforesaid petitions.

On June 9, 1954, the matter here involved was duly heard by your Referee and at the conclusion of the hearing he overruled the aforesaid objections to jurisdiction and ruled that the aforesaid petitions should be granted. On June 15, 1954, formal orders were made and entered in each of these cases requiring the said Walter C. Durst to turn over the property here in question to the aforesaid trustee.

On June 23, 1954, the said Walter C. Durst filed his petitions for orders staying the execution of the said orders of June 15, 1954. The said petitions were denied by orders of your Referee on the same day.

It is from the said orders of June 15 and of June 23, 1954, that these identical reviews are taken.

The Questions Presented

The questions presented by these reviews are set forth in detail in the aforesaid petitions for review, but in the opinion of your Referee, the only substantial question which is here involved may be stated as follows:

In these proceedings under Chapter XII of the Bankruptcy Act, did your Referee have jurisdiction, under Section 2(a)21 of said Act, to require the assignee for the benefit of creditors to surrender the property held by him to the trustee in these proceedings, prior to the confirmation of a plan in these matters?

The Evidence

Thus far no transcript of the proceedings in these matters has been furnished by the petitioner on re-

view, but since no formal evidence was received, the following brief summary of such proceedings should suffice.

When this matter was called on your Referee's calendar Walter C. Durst conceded, in response to an inquiry by your Referee, that his status in these matters was that of an assignee for the benefit of creditors. Thereupon the said Walter C. Durst asked leave to offer in evidence the documents relating to his assignment, and your Referee ruled that such proof was unnecessary in view of the aforesaid admission by the said Walter C. Durst that his status was that of an assignee for the benefit of creditors. Following this, your Referee made the rulings hereinabove set forth.

Referee's Orders

The originals of your Referee's orders in these matters are going up with this Certificate.

Papers Submitted

The following papers are herewith transmitted:

1. Petition to Direct Assignee for the Benefit of Creditors to Turn Over Property, filed June 2, 1954.
2. Order to Show Cause, filed June 2, 1954.
3. Special Appearance by Respondent Walter C. Durst, filed June 9, 1954.
4. Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in His Possession, filed June 15, 1954.
5. Petition for Order Staying the Execution of

the Order of June 15, 1954 Respecting Conveyances and Releases with Order, filed June 23, 1954.

6. Petition for Review of Orders of June 15, 1954, and June 23, 1954, filed June 23, 1954.

Respectfully submitted this 17th day of August, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy

[Endorsed]: Filed August 17, 1954.

[Title of District Court and Causes 60963-4.]

OBJECTIONS AND CHALLENGE TO THE JURISDICTION OF THE COURT

Comes now Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff and respectfully objects to and challeges the jurisdiction of the Court to proceed in addition to other grounds heretofore presented, upon the following grounds, to wit:

1. The debtors have no interest in the res constituting the assets of the general assignment, Brainard vs. Fitzgerald, 3 Cal 2d 157, which could have been attached, which is under Bankruptcy Act, Section 70a(5) "property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *" save and excepting the beneficial

interest, if any, of the debtors as resulting cestui que trust of the general assignment upon payment in full of the creditors of the general assignment and payment in full of the expenses of administration of the general assignment;

2. The interest of the debtors, if any, being only as resulting cestui que trust depends upon the result of the sale of the res of the general assignment by Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, and the payment in full of the creditors of the general assignment and the payment in full of the expenses of administration of the general assignment, which said beneficial interest as set forth in the schedules in bankruptcy appears to be substantial, passing to the trustee of these debtor proceedings;

3. The res constituting the assets of the general assignment if in custodia legis, which is not conceded, would be subject to the State Court action which first sought to obtain jurisdiction prior to the filing of these debtor proceedings.

Wherefore Walter C. Durst assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff prays that this Court Find: (1) that it lacks jurisdiction over the res constituting the assets of the general assignment; (2) that it has jurisdiction of the interest of the debtors, if any, being only as resulting cestui que trust of the general assignment depending upon the result of the sale of the aforesaid res by Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff without let or hindrance by

the debtors herein or the trustee herein, or either of them, and the payment in full by the assignee of the creditors of the general assignment and the payment in full by the assignee of the expenses of administration of the general assignment; and (3) that said interest of the debtors as resulting cestui que trust of the general assignment as set forth in the schedules in bankruptcy herein appears from the said schedules to be a substantial interest and passes to the trustee of these debtor proceedings, and that under such interest of the debtors as remains, the restraining orders should remain in full force and effect for the protection of such interest, pending and until the sale of the assets of the general assignment as aforesaid by the assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff.

/s/ WALTER C. DURST,
Assignee for the Benefit of the Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

/s/ MORRIS LAVINE
Attorney for the Assignee.

Acknowledgment of Service attached.

[Endorsed]: Filed Sept. 13, 1954.

[Title of District Court and Causes 60963-4.]

OBJECTIONS TO PETITIONS OF JACK P. KALPAKOFF AND MARY KALPAKOFF FOR REAL PROPERTY ARRANGEMENTS

Come Now, Lysle Greenman and Emma C. Greenman, Creditors of the above named bankrupts and object to the proposed real property arrangement of the above-named debtors upon the following grounds:

I.

That the Debtors' proposed real property arrangement dated May 31, 1954, is impractical and unworkable in that it relies on continuing ranch operations which have resulted in an annual operating deficit each year since prior to the year 1949 and for the further reason that there is no showing that any of the creditors will be paid by the adoption of such an arrangement.

II.

That the proposed arrangement sets forth no plan for the operation of the debtors' ranches nor for the payments of their debts.

III.

That said proposed arrangement does not state facts to show that there is any reasonable expectation that the debtors, Walter C. Durst, the debtor's Assignee for the Benefit of Creditors, nor any Trustee that might be appointed by this court would be able to:

A. Arrange for or obtain credit to carry on farming operations.

B. To pay delinquent taxes which are now in excess of Twenty Seven Hundred Fifteen Dollars ($2,715.00).

C. To produce a marketable crop.

IV.

The debtors have been operating the ranches described in the schedule on file herein since November 25, 1949 under the supervision and control of Walter C. Durst, as Assignee for the Benefit of Creditors, and the value of the debtors' assets has decreased from One Hundred Fifty Thousand Dollars ($150,000.00) on November 25, 1949 to One Hundred Thirty Three Thousand Four Hundred Dollars ($133,400.00) as of April 28, 1954. There is nothing in the debtors' proposed arrangements to show why the value of their assets have so decreased or how their properties could be operated more advantageously merely because someone called a "Trustee" was substituted for someone called "an Assignee for Benefit of Creditors." Nothing in the proposed arrangements indicates that there would ever be any proceeds for the benefits of the debtors' estate.

V.

The debtors' proposed plan does not reveal:

A. What part of the land described in the schedules is in cultivation.

B. What part of said land debtors intend to bring under cultivation.

C. What the anticipated operating expenses will be.

D. Where or upon what terms the debtors propose to obtain funds with which to operate their said ranches.

E. What they propose to use as security for loans.

F. Whether it can be reasonably anticipated that there will be any net profit from the operation of said ranches.

VI.

Neither of the schedules, nor the proposed real property arrangement reveals the true condition of the debtors' affairs. They merely show a lump sum indebtedness to Walter C. Durst, as Assignee for the Benefit of Creditors, in the total sum of Fifty Five Thousand Three Hundred Eighty Eight Dollars and Seventy Six Cents ($55,388.76). Schedule A-1 indicates that at least Twenty Four Thousand Four Hundred Fifty Four Dollars and Thirty Five Cents ($24,454.35) of said amount is represented by claims of unsecured creditors whose names and addresses are not given, and that Nineteen Thousand One Hundred Ninety Nine Dollars and Sixty One Cents ($19,199.61) is for claimed commissions of Walter C. Durst, as Assignee for the Benefit of Creditors, which amount is the subject of litigation now pending in the Superior Court of the state of California.

VII.

That the petition of Jack P. Kalpakoff and Mary Kalpakoff filed herein on April 29, 1954 shows that

the debtors are indebted for unpaid county taxes in the sum of Eighteen Hundred Seventy Two Dollars and Eighty Six Cents ($1,872.86).

These Objectors allege upon information and belief that some of said taxes are more than five (5) years and that if something is not done toward paying them immediately the land will be sold by the tax collectors for delinquent taxes.

VIII.

The Objectors object to the proposed property arrangement of the assignee, Walter C. Durst, upon the grounds hereinabove mentioned and upon the following grounds:

A. That the said Walter C. Durst became the Assignee for the benefit of creditors by virtue of an assignment from the debtors during the year 1949 and has ever since been in control of the debtors' properties and that each year since he has acted as assignee for the benefit of creditors he has sustained a loss.

B. That the said Walter C. Durst is not in a legal nor equitable position to question the rights of the debtors nor of these Objectors, particularly for the following reasons:

1. That he prepared the petitions under section 422 for the debtors herein, which said petition was filed herein on April 29, 1954 and that he joined in said petition by executing the same as assignee for the benefit of creditors; that he likewise prepared the original schedules for the debtors herein and if the debtors' plan of arrangement is not now

workable it was not workable when the said Durst prepared the same and was therefore a fraud upon the creditors and that by reason of said acts he is now stopped to assert any rights contrary to the rights of the debtors.

C. That it appears that the proposed plan of the said Walter C. Durst is for his individual benefit rather than for the benefit of the debtors' creditors.

D. That the Objectors are informed and believe and therefore allege that the said Durst has never obtained an offer to purchase either of the parcels of encumbered real property for the amounts which he now alleges that they are worth and that the said properties are worth only a small amount over and above the encumbrances.

E. That these Objectors have never received a payment of principal since the execution of the Trust Deed securing the debtors' note to them.

IX.

That the Objectors have employed, George L. Hampton, Attorney at Law to represent them herein and that the said attorney should be compensated for his services at the expense of the debtors and assignees general estate.

Wherefore the Objectors pray that petitions of the debtors and of the said Durst be denied; that the restraining order be dissolved. Should the restraining order not be dissolved and should either of said plans be adopted, either in whole or in part, the Objectors pray that the Court fix a reasonable

amount to be paid to the Objectors' attorney for his services herein, and for such further relief as to the Court may seem proper.

/s/ LYSLE GREENMAN
/s/ EMMA C. GREENMAN
"Objectors"
/s/ GEO. L. HAMPTON,
Attorney for Objectors

Duly Verified.

[Endorsed]: Filed September 13, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: September 13, 1954, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: J. M. Horn; Reporter: Virginia Pickering-Wright; Counsel for Debtor: Alfred Siemon; Counsel for Assignee: Morris Lavine.

Proceedings: Hearing on Order to Show Cause.

* * * * *

It Is Ordered Reporter E. B. Bowman in Referee Brink's court make a transcript of the proceedings held therein on June 9th, 1954, and July 7th, 1954.

A True Copy. Certified this 20th day of Sept. 1954.

[Seal] /s/ EDMUND L. SMITH,
Clerk
/s/ By J. M. HORN,
Deputy Clerk

Return on Service of Writ

United States of America,
District of California—ss.

I hereby certify and return that I served the annexed Minute Order on the therein-named E. B. Bowman, Court, by handing to and leaving a true and correct copy thereof with E. B. Bowman personally at Federal Bldg., Judge Brink's courtroom at L. A., Calif., in the said District at 2:15 p.m., on the 24 day of Sept., 1954.
Marshal's fees: $2.00. Mileage, $2.00.

[Seal] /s/ ROBERT W. WARE,
United States Marshal
/s/ By R. J. VALENCIA,
Deputy

[Endorsed]: Filed Sept. 29, 1954.

[Title of District Court and Causes 60963-4.]

PETITION FOR ORDER TO SHOW CAUSE TO RESTRAIN INTERFERENCE by Resulting Cestui Que Trust Respecting Sale of Assets by Assignee for the Benefit of Creditors and Fulfillment of the Purposes of General Assignment with Order to Show Cause.

To the Honorable Ernest A. Tolin, Judge of the United States District Court:

The petition of Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and

Mary Kalpakoff, by common law General Assignment dated November 25, 1949, respectfully represents and shows:

I.

That the assets of the general assignment consist of the following described real property:

Parcel 1, Lancaster, Los Angeles County, 160-Acre Ranch, being the Northeast Quarter of Section 23, Township 7 North, Range 13 West, S.B.B.M., also that portion of the Northwest Quarter of the Southeast Quarter of Section 23, Township 7 North, Range 13 West, S.B.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.

Parcel 2. Rosamond, Kern County, 240-Acre Ranch, being the N½ of NW¼ of Section 24, Township 9 North, Range 14 West, S.B.B.M., in the County of Kern, State of California, according to the official plat of the survey of said land on file in the Bureau of Land Management; and the NE½ of Section 23, Township of North, Range 14 West, S.B.B.M., in the County of Kern, State of California, according to the Official plat of the survey of said land on file in the Bureau of Land Management.

II.

That the liabilities of the general assignment are upwards of the sum of $106,000.00.

III.

That the respondents Jack P. Kalpakoff and Mary Kalpakoff are the Assignor under the general Assignment and are entitled to participate in any residue remaining in said general assignment after the payment in full of the creditors of the general assignment, the payment in full of the expenses of administration of the general assignment, whereupon the said respondents as resulting cestui que trust are entitled to receive payment in distribution of all surplus remaining.

IV.

That the respondent William Chernabaeff, trustee of these debtor proceedings has succeeded to the interest of the debtors as resulting cestui que trust.

V.

That the debtors herein have scheduled their interest in these proceedings in their respective amended schedules being Schedule B-1 herein, as follows: "Petitioner has an undivided one-half equitable interest as a resulting cestui que trust of the Jack P. Kalpakoff and Mary Kalpakoff General Assignment, created November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described as follows:

The north half of the Northwest quarter of Sec-

tion 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California $65,000.00. The Northwest quarter of Section 23, Township 7, North Range 13, West, S.B.M., also that portion of the northwest quarter of the southeast quarter of Section 23, Township 7 North, Range 13 West, S.B.M., described as follows: Beginning at the northwest corner of said southeast quarter; thence East along the North line of said southeast quarter, 208 feet; thence South parallel with the West line of said southeast quarter 104 feet; thence West parallel with the North line of said southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning. $65,000.00."

VI.

That the powers of the petitioner respecting the said lands as set forth in the general assignment are as follows:

"Said assignee is to receive the said property, conduct the said business, should he deem it proper, and is hereby authorized at any time after the signing hereof by the assignor to sell and dispose of the said property upon such time and terms as he may see fit* * *"

VII.

The assignee for the crop years 1950, 1951, and 1952, did deem it proper to conduct the business during said years, but with the advent of the 1953 crop

year the assignee did not deem it proper to conduct the business, and proceeded to sell a ranch or ranches, whereupon the assignor instituted litigation in the state court to block the sale, resulting in the lands going in default in 1953 and ensuing foreclosures in 1954, necessitating these Chapter XII proceedings, being filed by the debtors.

VIII.

Following the filing of these proceedings the assignee pursuant to the written approval of the assignor continued with the sale of the ranch or ranches, when again the assignor, the debtors here blocked said sale by instituting summary proceedings against the assignee followed by contempt proceedings to effect the same result as sought to be obtained in the aforesaid state court action.

IX.

Creditors, whose rights are vested, demand payment. The assignor has had five years to do that which he represented he could do in one year and the further interference of the assignor in the fulfillment of the general assignment by sale and distribution as aforesaid should be restrained by appropriate order in which the trustee in these proceedings should be included.

X.

Your petitioner since other pending matters were submitted herein September 13, 1954, has received offers totalling $99,000.00 for the two ranches, and

petitioner without in any way waiving any of the rights of the general assignment or of the assignee heretofore reserved herein to the jurisdiction of the court to do other than protect the rights of the assignor as resulting cestui que trust and their successor the trustee in these proceedings, seeks the within order so that he may proceed with the fulfillment of the general assignment by sale of its assets without let or hindrance of any kind by the assignor, the debtors or the trustee.

XI.

Petitioner is informed and believes and based upon such information and belief alleges that the aforesaid ranches should be sold for substantially higher sums *that* the aforesaid sum, and that upon the restraining order being granted herein it may be possible for petitioner to obtain offers for the said ranches in the neighborhood of the estimate placed thereon by the debtors aforesaid and that thereby a substantial sum may be realized for the debtors' estates herein as such resulting cestui que trust of the general assignment.

Wherefore your petitioner prays that an order be made and entered herein directed to the respondents Jack P. Kalpakoff, Mary Kalpakoff and William Chernabaeff, directing and commanding them to be and appear before this court on the day and date to be fixed therein and then and there show cause, if any they have, or either of them has why an order should not be made and entered herein

restraining the said respondents and each of them from in any manner interfering with the sale of the above described real property by the assignee for the benefit of creditors herein, in the fulfillment of the general assignment and in accordance with the powers therein granted; that service of the said order to show cause be by mail and that the time of service be shortened.

/s/ WALTER C. DURST,
Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Petitioner.

/s/ MORRIS LAVINE,
Attorney for Petitioner.

ORDER TO SHOW CAUSE

Upon reading and filing the duly verified petition praying for an order to show cause directed to the respondents above set forth and good cause appearing thereby and therefrom, on motion of Morris Lavine, attorney for the assignee for the benefit of creditors; now, therefore,

It is hereby ordered that the respondents Jack P. Kalpakoff, Mary Kalpakoff, and William Chernabaeff, be and appear before this Court on Monday, the 8th day of November, 1954, at the hour of 10:00 a.m., in the Courtroom of the Honorable Ernest A. Tolin, Second Floor, Federal Building, 312 North Spring Street, Los Angeles 12, California, and then and there show cause if any they have, or either of them has, why an order should not be made and

entered herein restraining the respondents and each of them, from interfering in any manner whatsoever with the sale by Walter C. Durst, Assignee for the benefit of creditors of the above within described real property to fulfill the purposes of the general assignment by the payment of the creditors of the general assignment in full, and the payment of the expenses of the general assignment in full, and by the payment in distribution of the residue of said sales after the payment of the foregoing, to the rspondent trustee as the resulting cestui que trust of the general assignment.

It is further ordered that service of this Order to Show Cause be made by mailing a copy thereof together with a copy of the petition upon which the same is based to Siemon and Siemon, attorneys for the respondents, and to the respondents, on or before October 20, 1954, and the time of service is shortened accordingly.

Dated this 18th day of October, 1954.

/s/ ERNEST A. TOLIN,
District Judge.

Duly Verified.

[Endorsed]: Filed Oct. 19, 1954.

[Title of District Court and Causes 60963-4.]

ANSWER TO ORDER TO SHOW CAUSE ISSUED OCTOBER 18, 1954

Comes now the Trustee in the above entitled matters and alleges and shows:

First Answer

There is now pending in this court a citation against petitioner Walter C. Durst as assignee for the benefit of creditors to show cause why he should not be punished for contempt for failure and refusal to obey the order of the Referee to turn over the property of the debtors to the Trustee herein for administration in this Court; that the matter involved on this order to show cause is a phase or aspect of and ancillary to the pending matter relating to the contempt for disobedience of the turnover order; and that petitioner on the order to show cause has delayed, stalled and postponed decision on the principal matter while attempting to obtain indirect action by the subject order to show cause.

Second Answer

1. The petition on which the subject order to show cause was issued does not state any facts which are new or supplementary to facts already before the Court in the contempt proceeding, or any matters except conclusions and argumentative matter; that it is sham, frivolous and vexatious in that it alleges proceedings by debtors to "block" or which "blocked" unspecified and non-existent sales, admits

failure to operate during the years 1953 and 1954, attributes defaults and foreclosures occurring prior to commencement of such blocking procedures (litigation) to such litigation, falsely alleges that the existence of proceedings by him for sales were suspended by summary proceedings herein when as a matter of law, as he well knows, any possibility, proceeding or ability on his part to make a sale as Trustee was suspended by the commencement of these proceedings which he caused debtors to commence in order to avoid loss of the assigned estate due to his own default; that he fails to be specific about the alleged offers mentioned in his paragraph X; that it does not appear that said Durst is in position to accept or consider any offer, or in position to sell said properties; that it does not appear that such offers may not be general offers which may be acted upon by the Trustee, or that the Trustee may not have received the same offers; that it does not appear what debtors or the Trustee may be doing, or what act of theirs is complained of, that interferes with a sale by Durst if he has any power or right to make a sale; that it appears that the only thing which prevents him from making a sale, if he has any power or authority to make sales, is the pendency of these Chapter XII proceedings, which he admittedly commenced himself; that there is no order the Court could make on the order to show cause which would permit Durst to sell, or prevent debtors from interfering with a sale by him, except an order dismissing these proceedings; that the Court in this matter is without authority to

declare or adjudicate that he has a right to sell on an order to show cause; and that to attempt any such thing by order would amount to renunciation of jurisdiction.

2. For the reasons above alleged the petition is contemptuous, obstructive, vexatious and sham; and has no object or purpose except harass the administration of the estates of debtors, to the prejudice and disadvantage of the creditors and all concerned.

3. No ground or reason is or can be shown why sales may not be made by the Trustee under the processes of this Court to as great or better advantage to the estates as sales by the assignee; and the Trustee has had many propositions for sales on which he has not been able to act by reason of the failure of Durst to obey the turn-over order.

Therefore, your Trustee prays that the order be dismissed.

SIEMON & SIEMON,

/s/ By ALFRED SIEMON,
Attorneys for Trustee.

Duly Verified.

[Endorsed]: Filed Nov. 8, 1954.

[Title of District Court and Causes 60963-4.]

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITIONS for Review of Orders Requiring Assignee to Turn Over Property.

To the Honorable Ernest A. Tolin, Judge of the above entitled court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matters are pending under orders of general reference, do hereby supplement my Referee's Certificate on Petitions for Review of Orders Requiring Assignee to Turn Over Property which I filed with the Clerk of the Court in the said matters on August 17, 1954, by transmitting herewith the Reporter's Transcript of proceedings had in the said matters on June 9 and July 7, 1954.

Respectfully submitted this 10th day of November, 1954.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed Nov. 10, 1954.

In the United States District Court, Southern District of California, Central Division

In Bankruptcy—No. 60,963-T and No. 60,964-T

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

TRANSCRIPT OF PROCEEDINGS

At Hearing on Order to Show Cause, Debtors vs. Walter C. Durst, Assignee, June 9, 1954, and July 7th, 1954.

Before the Honorable Benno M. Brink, Referee in Bankruptcy.

Appearances: For the Debtors: Siemon and Siemon, by Alfred Siemon, 259 Haberfelde Bldg., Bakersfield, Calif. For the Assignee: Walter C. Durst, Assignee, in Propria Persona. For Los Angeles Production Credit Association: Floyd E. Pendell, by Walter A. Brown. For Philip M. Schwabacher; Philip M. Schwabacher, In Propria Persona. For Lysle Greenman and Emma C. Greenman: George L. Hampton. For Shephert Tractor & Equipment Co.: A. F. Mack. For Director of Internal Revenue: H. W. Vestermire.

Los Angeles, Wednesday, June 9, 1954, 10 a.m.

The Referee: Jack P. Kalpakoff and Mary Kalpakoff.

Mr. Durst: I am appearing specially as Respondent.

Mr. Alfred Siemon: Counsel for Debtors is here.

Mr. Pendell: I am appearing for Attorney Wal-

ter E. Brown, who represents the Los Angeles Production Credit Association.

Mr. Schwabacher: I am appearing in Propria Persona.

Mr. Hampton: I am appearing for Lysle Greenman and Emma C. Greenman.

Mr. Mack: I appear for Shepherd Tractor & Eqiupment Company.

Mr. Vestermire: I appear for the Director of Internal Revenue.

The Referee: As you are all advised, this is a proceeding under Chapter 12 of the Bankruptcy Act. We do not have many of these proceedings in this Court, so it may well be that you gentlemen here as attorneys may know more about the actual procedure than the Court does, and if I say something out of line I hope you will correct me immediately, so that we will not get off on the wrong start here. These are separate proceedings, as they have to be under the law, but they involve the same subject matter, namely, certain real estate, which is subject to encumbrances, and it is the desire of the Debtors to work out a Plan of Arrangement with the necessary Consents required by the Statute for the eventual satisfaction and payment of these obligations. Mr. Siemon, what do you want to do this morning?

Mr. Siemon: We have an Order to Show Cause here requiring Mr. Durst to turn over the property to the Trustee for the Debtors, which we think is essential to the successful administration of these estates. Can we have that heard first?

The Referee: Yes; and Mr. Durst has filed a Special Appearance here. This Appearance by Mr. Durst recites that:

"Respondent, without waiving any of his rights under the special appearance, invites the court to consider the following:

"(1) The appointment of an appraiser to appraise the two ranches of the debtors to determine the value of the interest of the debtors therein as resulting cestui que trust under the general assignment;

"(2) The debtors' proposal to pay their secured creditors 100 cents on the dollar in five years from operation or sale of 160 acre and 240 acre alfalfa ranches in which debtors have an equitable interest other than the right to redeem from a sale before filing of their petitions herein."

Well, I will hear you, Mr. Durst. I don't understand what you want the Court to do.

Mr. Durst: I believe the authorities appended to the Special Appearance I have filed here, and the first case cited is right in point, the case is "In Re Preas," on the one proposition mentioned. My time has been short and I have been heavily pressed and haven't been able to give it the time I should have, and Mr. William J. Cusack, my attorney, is out of the jurisdiction. That case I cited has been affirmed by the Circuit Court on the matter of removal of an assignee.

The Referee: But, all you have filed here is an invitation for the Court to do something.

Mr. Durst: Yes, but it is further set forth there, and you didn't read it.

The Referee: Paragraph one alleges "the Court is without jurisdiction to (1) summarily remove Walter C. Durst, as assignee for the benefit of the creditors of Jack P. Kalpakoff and Mary Kalpakoff, or (2) require the assignee to turn over, release, reconvey and surrender to any person whomsoever, save upon fulfillment of the general assignment when the residue thereof will pass to the debtors, such title, claims, liens, assignments and conveyances, crop mortgages, or any other conveyances of any kind or character executed by Jack P. Kalpakoff and Mary Kalpakoff to Walter C. Durst, assignee for the benefit of the creditors of Jack Kalpakoff and Mary Kalpakoff, commencing with the General Assignment dated November 25, 1949, and all succeeding documents, denied by Answer filed by Walter C. Durst, in pending Los Angeles Superior Court Action No. Transferred to Los Angeles SFC 914."

The Referee: Then, this is an objection to the jurisdiction of this Court to require the Assignee for the Benefit of Creditors to turn over?

Mr. Durst: Yes.

The Referee: I do not understand clearly the grounds upon which you make your objection. You start here, in the paragraph I have read, to invite the Court to consider the appointment of an appraiser to determine the value of the interests and the ability of the debtors to pay their secured creditors. I don't know that I can do that, and I don't think that is material, and I don't know why an appraisal is material on the question of removing

the assignee. I think it is covered by Section 2, sub-division 21 of the Bankruptcy Act. Doesn't that provide for the removal of an assignee for the benefit of creditors?

Mr. Durst: No, it merely provides for an accounting.

The Referee: Subdivision (21) of the Statute (reading:)

"Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not [5] prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, That such delivery and accounting shall not be required except in the proceedings under Section 77 and chapters X and XIII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such property by

such receiver, trustee or assignee, or agent, either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act, surcharge such receiver, trustee, assignee, or agent, the amount of any disbursement determined by the court to have been improper or excessive."

There is the whole statute.

Mr. Durst: The proceedings here appear to the assignee not to seek that particular relief; they are conflicting. Perhaps they are only ambiguous. The proceedings seek to maintain the action in the State Court and at the same time do the same thing in this Court. The action in the State Court went through three demurrers, and the essence of the demurrers that Mr. Cusack presented were that all the beneficiaries under the general assignment were not included as parties, and the Second Amended Complaint was knocked out on that score; and the Third Amended Complaint did present another list of the beneficiaries under the general assignment. They are not named here as respondents, and exactly the same principle involved in that circumstance is present in this Order to Show Cause. The word of action in the Section your Honor read, I believe, is the word of accounting. There is no denial of the right of this Court to require an accounting.

In the case of Preas, 33 Federal Supplement, 578, affirmed in Preas vs. Kirkpatrick and Burks,

CCA 6th, 115 Federal Second, 802, this statement was made:

"As to the removal of the trustees it is perfectly clear in my opinion, that the referee was without jurisdiction to summarily remove them."

I cited the District Court case because it doesn't clearly appear from the Circuit Court case what the question was that was involved. The Hamburger case——

The Referee: I will get all the cases. It does appear from the language of the Section just read that the necessary prerequisite is that it might be for the appointment of a [7] trustee. You have a petition here for the appointment of a trustee now, counsel?

Mr. Siemon: Yes.

Mr. Durst: The Plan of Arrangement doesn't provide for payment of expenses of administration, and I have an authority to the effect that a proceeding that doesn't provide for that may be dismissed.

The Referee: Section 432, Chapter 12: (reading)

"The court may, upon the application of any party in interest, appoint a trustee of the property of the debtor."

And Section 441: "A trustee, upon his appointment and qualification, shall be vested with the title of a trustee appointed under Section 44 of this Act."

Section 411: "Where not consistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter,

have exclusive jurisdiction of the debtor and his property, wherever located."

Mr. Siemon: If the Court will permit us to do so, and subject to the approval of the creditors here, I would like to suggest the name of William Chernabaeff as trustee. He is in his fifties, and is a successful farmer in the Shafter area in growing produce and other crops, and he owns considerable land out there, most of which is rented out; and I think he is a cousin of Mrs. Kalpakoff, and he has offered to raise sufficient funds to put this train back on the track.

The Referee: Well, we will go on with the questain of the appointment of a trustee, and then go back to Mr. Durst. Does anybody want to be heard on the subject of counsel as to the appointment of a trustee?

Mr. Brown: I understood a trustee would not be appointed unless two-thirds of the creditors consent to an arrangement. I may be wrong.

The Referee: I don't think you are right, no, on that. Section 432 says:

"The court may, upon the application of any party in interest, appoint a trustee of the property of the debtor."

Mr. Brown: It is my understanding that an arrangement must be accepted in writing, requiring two-thirds in the amount and number of creditors. Whether you can appoint a trustee before the arrangement has been accepted or not is doubtful in my opinion, because what would you appoint a trustee for if there was no arrangement?

The Referee: The property might require the attention of an officer of the Court pending the arrangement, if an arrangement is to be confirmed. I think it is analogous to the provisions in Chapter XI.

Mr. Brown: On that theory we would have no objection to it.

The Referee: No, it doesn't imply the confirmation of a plan, at all, but it is to preserve the assets pending a ruling.

Mr. Siemon: I concur in what the Court has just stated.

Mr. Brown: I think the Court should know that this Mr. Chernabaeff has been trying to buy this property for the last three years for himself, and I would like to know if he would be the proper person to be trustee.

The Referee: Ordinarily in a liquidation proceeding, naturally, that would have to be taken into consideration, because he might work up a deal advantageous to himself and exclude every other possible purchaser, but here we are dealing with debts which are secured, and if this gentleman is appointed trustee and he does finagle around and work out a deal whereby he steps into the shoes of the Kalpakoffs he is still responsible for the same secured obligations that the Kalpakoffs are.

Mr. Siemon: I think Mr. Schwabacher has something to say about it.

Mr. Schwabacher: I think it is immaterial. I go along with the Court and concur in the appointment of a Court officer, but do not waive any right

as to acceptance of the plan.

The Referee: No, there is an entirely different Section, Section 468, which provides:

"If an arrangement has not been so accepted, an application for the confirmation of an arrangement may be filed with the court within such time as the court shall have fixed in the notice of such meeting, or at or after such meeting and after, but not before it has been accepted in [10] writing by the creditors of each class, holding two-thirds in amount of the debts of such class affected by the arrangement proved and allowed before the conclusion of the meeting, or before such other time as may be fixed by the court."

Mr. Durst: The plan provides for a trustee resident in Los Angeles County, but Mr. Chernabaeff doesn't reside in Los Angeles County, and requests to have him made receiver in the State Court were withdrawn, and I believe I should mention this only as an invitation to the Court here to concur or to consider that, and I think the Court here should consider a regular trustee, like Mr. Gardner or Miss Danning, or somebody familiar with this sort of thing.

The Referee: That is something the Court will not be inclined to do, this being a very unusual case and the gentlemen who are good enough to assume the responsibility as trustee in bankruptcy proceedings ordinarily do not have the time and are not equipped to supervise any type of farming operations, but we want somebody who has the time and experience to do a good job, and while he may

be a purchaser the plan applies only to a trustee who would function after confirmation of the plan, and that proposition might be subject to an amendment if agreed upon by the creditors. Are you a creditor?

Mr. Durst: I am the holder of the assets.

The Referee: Unless you are a creditor your observations are not in point.

Mr. Durst: I have done all I can do upon the advice of counsel up to this point.

The Referee: Going back to your objections to our jurisdiction here, this is the Preas case, 33 Federal Supplement, 578, and I will first read the syllabus and see if we can get a grasp of the case, (reading):

"In proceeding on petition for real property arrangement, where it appeared that the arrangement proposed by the debtor related only to secured creditors and that debtor was in possession of property other than that incumbered to secure the creditors affected by the proposal and requisite number of creditors had not accepted proposal dismissal of the petition was proper."

That is one paragraph of it. Also (reading:)

"In proceeding on petition for real property arrangement, where both debtor and involved secured creditors were entirely familiar with value and property, failure of referee to appoint appraisers was not error, notwithstanding theory of debtor that appraisal would have had a coercive effect on belligerent secured creditors."

Also (reading:)

"In proceeding on petition for real property

arrangement, referee was without jurisdiction summarily to remove trustees named in trust deeds, notwithstanding debtor's theory that if trustees wereremoved there would be hope of procuring an acceptance of requisite creditors to permit confirmation."

That case was appealed and went to the Court of Appeals for the Fourth Circuit, under the title "Preas vs. Kirkpatrick and Burns, CCA 6th, 115 Federal Second, 802." (Reading:)

"Where debtor, who filed petition under Bankruptcy Act alleging solvency and praying for extension of time for payment of debts, did not apply to District Court for appointment of a trustee to control debtor's property which was in hands of trustees under trust indentures, debtor could not complain that referee denied debtor's application for removal of trustees." Also (reading:)

"Where debtor who filed petition under Bankruptcy Act alleging insolvency and praying for extension of time for payments of debts, did not apply to District Court for appointment of a trustee to manage debtor's property which was in hands of trustees under trust indentures, debtor could collect rents from property if no trustee was appointed, and, referee's denial of debtor's motion to be permitted to collect rents was a substantial grievance. However, debtor's petition could be dismissed before appointment of a trustee or continuation of possession of property in debtor's hands, where no proposal by secured creditors was pending, and there was no probability that any proposal would be accepted by creditors."

Then, Mr. Durst has cited the case in 117 Federal Second, 932, in re Hamburger et al. vs. Dyer.

I find nothing in this citation relating to the removal of an assignee.

Mr. Durst: That case is cited on the point of the appointment of an appraiser. The notation I have is (reading:)

"The statute (Chapter XII of the Bankruptcy Act) neither expressly nor by implication provides for consent by the debtor to any arrangement, nor for participation in the proceedings if the real property covered by the arrangement is so far below the unsubordinated debts in value that no equity is left for the debtor."

The Referee: That has nothing to do with the Court's jurisdiction, but might go to the question of whether the Court should further entertain the matter. The final case cited by Mr. Durst is 195 Federal Second, 263.

Mr. Durst: That is cited on the second point of my invitation, and doesn't go to the point of removal.

The Referee: The objection to the jurisdiction on the part of the Assignee for the Benefit of Creditors is overruled. Do you want to be heard on the question of your removal, Mr. Durst? I have ruled that I have jurisdiction to remove you.

Mr. Siemon: Isn't it a question to require him to turn over the property?

The Referee: Yes, and also to make an accounting. [14]

Mr. Durst: If I understand what the Court has

just said, the turning over of the property could be the turning over the possession of the property.

The Referee: No, the question is this: Shall I require you to turn over to a trustee appointed by this Court everything you now have possession of, title to or interest in in this matter?

Mr. Durst: This Court has lack of jurisdiction to do that in the absence of the inclusion of the beneficiaries of the general assignment, and I have authority on that.

The Referee: No, I don't want that. You concede that you are assignee for the benefit of creditors in this matter, do you?

Mr. Durst: Yes.

The Referee: Is there anything else you want to say?

Mr. Durst: Yes, I will present my proof.

The Referee: What proof?

Mr. Durst: My documents in the way of documentary evidence.

The Referee: You concede that you are assignee for the benefit of creditors?

Mr. Durst: Yes, and I want to show how I became that.

Mr. Siemon: The Petition for the Order to Show Cause concedes that. I don't think any proof is required where we concede that, and unless we get this property into the Bankruptcy Court and have a trustee we might as well dismiss this proceeding.

The Referee: I don't understand what you mean by proof, Mr. Durst. It is alleged that you are Assignee for the Benefit of Creditors, and you con-

cede that to be a fact.

Mr. Durst: Yes, that is true.

The Referee: What proof do you want, then?

Mr. Durst: I am here without counsel, my counsel is away, and I have had no opportunity to consult anybody about it, and I can only draw upon the information my attorney has given me, and this exact same issue of cancelling of these documents and restoring the debtors to their original possession and position is now pending in the State Court.

The Referee: That is not a bar to the jurisdiction of this Court.

Mr. Durst: No, I don't say that; but I will make a motion to dismiss the Order to Show Cause, on this point:

My motion is that the Order to Show Cause be dismissed on the ground that "An express trust in land created to pay the grantor's debts cannot be revoked without the consent of all the creditors for whose benefit it was created; nor can it be extinguished without the beneficiaries' consent, except by entire fulfillment, or by its object becoming impossible or unlawful." California Civil Code Annotations, Section 2279.

The Referee: Motion denied.

Mr. Durst: The respondent is ready to proceed with the trial of the issue.

The Referee: There is no trial necessary. You are the Assignee for the Benefit of Creditors, and you have property of the debtors, and in your capacity as Assignee the Bankruptcy Act confers juris-

diction on the Court in a proceeding under Chapter Twelve to require the Assignee to surrender the property and an accounting, regardless of the time the assignment was made.

Mr. Durst: I want to read the Act, Section II, I believe, 21 of the Act.

The Referee: I have read it in its entirety, and what do you find in there that would justify this Court in not requiring the Assignee for the Benefit of Creditors to turn over the assets?

Mr. Durst: I submit, your Honor, that a reading of this Section for the delivery of the possession and the accounting, that none of the rights which the Assignee has are taken away from him. I believe the Assignee stands in exactly the same position as a mortgagee in possession, and I again cite the Preas case.

The Referee: I will read to you the language:

"Require assignees for the benefit of creditors to deliver the property in their possession or under their control."

Mr. Durst: I will state that the property which I have is this:

The general assignment is supported by deeds to the two ranches; the general assignment is further supported by a promissory note in the amount of $95,000, which was the total debts of the estate at that time, secured by crop mortgages on both of the ranches.

The Referee: I am sorry, Mr. Durst. I think I understand the situation. The Petition is granted.

You may present an appropriate order, counsel,

and send Mr. Durst a copy of it, and we shall enter the order. How much time do you want for the accounting, Mr. Durst?

Mr. Durst: I am ready to file an accounting instantly, if the Court will direct me. I have copies of the annual accountings, which I have saved.

The Referee: No, I will not take those; and let's shorten this. You are directed to deliver all property in your possession forthwith, together with the necessary instruments which may be required to accomplish that delivery. You may have 10 days from the date of the order in which to file your accounting as Assignee, and a copy thereof to be transmitted on the date of the filing to counsel for Debtors. That should all be incorporated in the order, counsel.

Mr. Siemon: Yes, your Honor; and if this trustee is appointed I think the matter of the arrangement can go over for a short time to confer with the trustee as to these liens, and I think counsel here for the creditors will not object to that.

Mr. Hampton: So far as we are concerned we would be willing to have the matter go over 30 days to see if that can be worked out, to see if they can sell the property; but if they can't, we would like to have it understood that they make no application for further restraining order under the trust deeds.

The Referee: We have that proposition very often here and it just is not feasible.

Mr. Hampton: I was afraid of that.

The Referee: We don't know what might occur

30 days hence, and I prefer to leave it with a straight continuance; but, first, is the question of the trustee.

Mr. Mack: One of the questions is whether or not this ranch is going to be operated, since it is in bankruptcy, and I think it is very material.

The Referee: The Court authorizes the borrowing of sufficient money on a current crop to take care of the equipment company situation. You want to go ahead with the producing of the crops?

Mr. Siemon: Yes, your Honor.

The Referee: Will this man accept the trusteeship?

Mr. Siemon: He assured the debtors that he will, if we get Mr. Durst out.

Mr. Mack: I don't believe this is the type of man to do this. It requires a great deal more book work than ranching, and Mr. Kalpakoff is going to be operating the ranches, and it takes the handling of finances and funds and incoming money and keeping books, and Mr. Chernabaeff may be a good farmer, but I don't know that he is the type of man to be trustee in this matter.

The Referee: My reaction is that we should have somebody in that area to act as trustee. I can't send one of our regular trustees away out there to handle it; and the Court has control of it all the time and if it happens that it is not working out I have control over it. How much bond do you suggest? How much money is the trustee going to have?

Mr. Siemon: I would say a $5,000 bond would

be sufficient to start with, and raise it later on when the crops are harvested.

The Referee: We, of course, have authority to increase a bond of a trustee, and you should inform this man that if he takes into his possession cash in excess of the amount of his bond, then, the bond must be increased according to such amount. Is there any further comment about the amount of the bond at this time? (No response.)

Now, let me try to put down on paper here the name of the trustee.

Mr. Siemon: His name is William Chernabaeff.

The Referee: Have you his address?

Mr. Siemon: Yes, Shafter, Kern County, California.

The Referee: I have to have an order, counsel, appointing him trustee, and the bond of this trustee must be a surety bond for $5,000.

Mr. Siemon: I will draw the order; and the order to turn over the property will be an order to turn it over to the trustee?

The Referee: Yes, but he must qualify immediately and get that bond in here and file it, and file an order approving his bond, with the bond; and you should send in some copies of it so we can certify them and return them to you, showing his authority to act as trustee. You may have any number of copies you want of the order.

Mr. Siemon: I will have it multigraphed.

Mr. Hampton: I suppose it is satisfactory if we prove our claims at the time it goes over to?

The Referee: Yes, everyone may do that.

Mr. Brown: I would like to suggest a 45-day continuance, because I think there is a very great doubt if there will be sufficient money produced to accomplish the plan of the debtors, but I think we will know the answer by that time.

Mr. Siemon: Yes.

The Referee: What about Wednesday, July 28th at 10 a.m.? Is there any objection to that particular date?

Mr. Durst: Would the Court extend the time within which the Assignee could file a petition for review to and including that date?

The Referee: No, no, there is no reason for that.

Mr. Durst: It occurs to the Assignee that someone might desire to take up his rights here.

The Referee: You may file the petition for review within 10 days from the date of the order; or within that 10 days you may file a petition for an extension of time.

Mr. Hampton: Mr. Durst, has anything been done to put the taxes on a five-year plan?

Mr. Durst: A letter has been received and I hand it to you, stating they will take it up on July 1st.

Mr. Hampton: I suggest that the trustee have power to borrow sufficient money to pay the first payment of those taxes on the five-year plan.

The Referee: I think Mr. Siemon should take care of that.

Mr. Siemon: I shall do that.

The Referee: That is all today.

Los Angeles, Wednesday, July 7, 1954, 10 a.m.

The Referee: We will take up the two Kalpakoff matters.

Mr. Durst: I would like to hand up an Opposition with the Motion and Affidavit of Walter C. Durst. I would like to say that the Opposition is based on the Assignee's Reports, and I hand up the four Annual Reports, and the Supplement. Those are the originals of the Annual Reports and the Supplement, and contain all the documents and assignment and letters from and to the Debtors.

The Referee: Are there any copies available of these instruments?

Mr. Durst: They have been served.

Mr. Siemon: Yes, we have copies of those.

Mr. Durst: Do you desire a copy, Mr. Allen?

Mr. Allen: No. I am not attorney of record for the Greenmans, although Mr. Greenman is a client of mine, but I am not appearing of record here for him.

Mr. Durst: I would like to ask that those documents be marked as exhibits.

The Referee: The Court has not engaged in any hearing yet, and it is not proper to mark anything as an exhibit at this time.

Mr. Durst: Thank you, your Honor, and I apologize.

The Referee: Now, let's get this situation clear, Mr. Durst; as you know, the Court has entered an order directing you to do certain things, and there is a showing that you failed to do those things. The Court is now asked to certify the matter to the

United States District Judge for contempt proceedings. Now, you have an instrument here you call an Opposition and a Motion. First of all, the Court, at a hearing such as we are now having, does not go behind the order made requiring you to do certain things. The only thing you can show here is that you did not and are not wilfully disobeying the order. That would be a factor the Court would take into consideration in determining whether or not it should be certified at all, and if so, the manner in which it should be certified. Now, of course, you, at any time, can move the Court to vacate the order now sought to be imposed by contempt proceedings and reopen the hearing. I am not clear as to what you are doing here. Are you showing grounds why the Court should not certify you as being in contempt, or are you moving the Court to vacate the order showing you to be in contempt, and reopening the hearing in the matter, or what are you proposing to do?

Mr. Durst: Well, I was puzzled by the order of June 15th. I am representing myself and I may have a fool for a client. I was fooled by the order of June 15th which recited that the matter in the petitions of the debtors were not controverted.

The Referee: Now, let us not have any extensive discussion here; the order is made, and whether you did or did not understand it is of no materiality here now, and there are only two things that can be done by you here this morning; either show good cause why you should not be certified for fail-

ure to comply with the order, or make a motion to forget the order and reopen the proceedings.

Mr. Durst: I consider that I have made such motion.

The Referee: Let us try to understand this situation. A hearing was had and an order made, and the order was served upon you and you filed a petition for review of that order.

Mr. Durst: Yes, within the time allowed.

The Referee: And you also filed another petition here, I don't know whether counsel was advised of it or not.

Mr. Durst: Yes, he was served with it, and that was the stay.

The Referee: You filed a petition for order staying the execution of the order of June 15th, 1954, and that petition was denied by this Court June 23, 1954.

Mr. Durst: And a review was taken on both orders.

The Referee: While you claim you are without counsel, you are an attorney and as such you are familiar with the provisions of Section 39c of the Bankruptcy Act, which provides, among other things:

"The court, upon the filing of a petition for review, may suspend the execution or enforcement of the order complained of upon such terms and conditions as the court may deem advisable and as will protect the rights of all parties in interest."

You have applied to the Court for a stay, and that is denied. Therefore, the Court's order from

which you have filed a petition for review is in full force and effect.

Mr. Durst: No, not as I read the cases, citing 98 Federal, 839; 193 Federal, 622.

The Referee: You say that you are making a motion to vacate the order made by the Court, and which is here sought to be considered; you have already filed your petition for review?

Mr. Durst: Yes; and I will state there having been no certificate, I believe that for the purpose of the motion to vacate the reviewing party would be entitled to do one of two things, either withdraw the petition for review upon being granted an extension of time within which to review, or to take the position that for the purpose of the motion the petition for review might be deemed to be withdrawn.

The Referee: I will consider your motion. The grounds upon which your motion is made are the following:

(Whereupon, the Referee read said motion in its entirety.)

Mr. Durst: Thank you.

The Referee: All of that is immaterial, and the motion is denied. Have you any cause to show why you should not be certified for contempt?

Mr. Durst: Yes; I offer the assets, first; and the four reports and the supplements to them, as exhibits.

Mr. Siemon: We object to those as exhibits. They only have a bearing on his relationship to the assets which are his only as Assignee for the Bene-

fit of Creditors, and they are offered only to smother us with paper work.

The Referee: The objection is sustained and the instruments are rejected. Do you offer these as reports of your acts and conduct as Assignee for the Benefit of Creditors?

Mr. Durst: Yes.

The Referee: If you want to file them at this time in that sense the Court will call the Clerk and have them filed, but they are definitely not to be any of the record of proceedings before the Court at this time.

Mr. Durst: Yes, but I have made the offer of proof and that is a part of it, and I ask that these documents be sent to the District Court Judge as my exhibits.

The Referee: I will not do that. I sustain the objection to the offering of these instruments in evidence, and they are rejected and are not in evidence. However, after we have concluded here if you want to have these instruments filed as your reports and accounts I will have the Clerk file them. Have you anything else to show why you should not be certified for contempt?

Mr. Durst: I desire to clarify one thing, and that is to have these documents marked for identification, because I am going to take it to the Judge of the District Court and ask that Court to order them up on this matter, and I don't want to get into any lack of protecting myself. I believe your Honor is trying to help me, I have no doubt of that, and I am satisfied your Honor is trying to do

the best he can for me, but I am not used to anything like this, and I am trying to act for myself, and I ask that these documents be marked for identification in this proceeding, under the rules of documentary evidence.

The Referee: Do these documents show you complied with the order here?

Mr. Durst: They show I have no right to comply with the order, and that I am powerless to do so. There is also an authority in the United States Codes Annotated, to the effect that contempt cannot be had where there is no authority and no power to make reconveyance. The General Assignment gives me power to act only as Assignee, and at no time do I ever intend in my life to execute a release in this case only on fulfillment of the General Assignment.

If the Court desires to appoint a Commissioner to function for me, all right; but I have no power to execute a reconveyance and release; and I desire to have these documents marked for identification for consideration by the Judge of the District Court—(pause)—I had them in my hand and I sought to introduce them at the last hearing and this Court wouldn't receive them, and I now move that it be reopened as of June 9th so they may be part of the record in this matter.

The Referee: Your motion is denied, and I want this record to show that these instruments you desire me to mark for identification consist of five separate bound volumes which, I think, make a pile of documents at least six inches high. If I am

not correct, correct me. I do not propose to encumber this record with these documents, or to impose upon the District Judge in that manner. I shall read into this record a description of these instruments, and if the Judge who hears the case rules I was in error in not marking them for identification, I am sure they can be readily produced before the Judge. The instruments in question are:

"In the Matter of General Assignment of Jack P. Kalpakoff and Mary Kalpakoff, Debtors, Assignors:

"First Report and Account of Assignee for the Benefit of Creditors, from November 25, 1949 to December 31, 1950."

"Second Report and Account of Assignee for the Benefit of Creditors, from November 25, 1949 to November 25, 1951."

"Third Annual Report and Account of Assignee for the Benefit of Creditors, for the period from November 25, 1951 to December 17, 1952."

"Fourth Annual Report and Account of Assignee for the Benefit of Creditors, for the period from November 25, 1952 to December 17, 1953."

"Supplement to Assignee's First Report, Second Report, Third Report, and Fourth Report."

Documents signed by the Kalpakoffs, letters mailed and received to and from Kalpakoffs.

(Immediately following five-minute recess the hearing was resumed, as follows:)

Mr. Durst: I wish to offer in evidence in my defense the Proposed Real Property Arrangement, particularly in reference to paragraph IV, as follows (reading):

"Trustee to take over and be substituted for petitioner as plaintiff in the action against Walter C. Durst referred to in Amended Schedule A-2(7) and Amended Schedule B-3, and prosecute the same on behalf of the estate for cancellation of the assignment for the benefit of creditors and for damages for fraud, neglect, non-performance of duties and mismanagement of the assignee for the benefit of creditors, and to such end to file such amendments to the pleadings and initiate and prosecute such proceedings in said action as may appear to be required."

The Referee: You are offering in evidence the Original Petition under Chapter 12 in these cases?

Mr. Durst: No.

The Referee: Is not that what you are reading from?

Mr. Durst: No; I am reading from the "Proposed Real Property Arrangement" by the Debtors.

The Referee: Is that the pending Plan of Arrangement?

Mr. Siemon: Yes, the pending proposed arrangement, and that is what we have filed.

Mr. Durst: I would like to be sworn.

The Referee: For what?

Mr. Durst: To give testimony on how and why these were filed.

The Referee: No, I am sorry; you are still subject to the direction of this Court.

Mr. Durst: Yes.

The Referee: I have given you every opportunity to show some cause why you should not be certified for contempt, and I think you have had

ample time to do it, and you have suggested a number of irrelevant and immaterial matters, and I don't think you have any good cause to show why you should not be certified for contempt, because the matter is so simple that it will not take any time at all——

Mr. Durst: How simple is it?

The Referee: No, listen to me.

Mr. Durst: I want the Court to state how simple it is.

The Referee: Yes, I want to be verified by the exact language of the statute and then I will tell you why it is simple.

Mr. Durst: I will lend the Court the book.

The Referee: I will get my own book. It is conceded, of course, that the matters now pending before the Court here were filed and will be administered under the provisions of Chapter XII of the Bankruptcy Act. Under Section Two of the Bankruptcy Act, Paragraph A, Sub-Division (21) the Bankruptcy Court has jurisdiction to:

"Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or a trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provi-

sions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under Section 77, Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy."

Now, my attention has not been called by anybody to any provision of Chapter XII itself——

Mr. Durst: 475.

The Referee: Which says this Court does not have jurisdiction to require an assignee for the benefit of creditors to turn over, notwithstanding the fact that the assignment was made more than four months before the filing of the petition.

Mr. Durst: I request that you read aloud Section 475.

The Referee: All right; Section 475: (reading) "The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

The Section I have just read is not applicable to the question at hand.

Mr. Durst: I submit it is a——

The Referee: I am sorry, Mr. Durst, I don't want any argument as to that.

Mr. Durst: I ask for a continuance.

The Referee: Article III of Chapter XII sets up the "Jurisdiction, Powers, and Duties of the Court." Section 411 of that Article provides that:

"Where not consistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

I find nothing in Article III specifically referring to the power of the Court to require Assignees to turn over.

Now, Mr. Durst, this Court has been functioning here, this Referee, for 18 years and I do not recall another instance where the Court found it necessary to certify anybody for contempt proceedings, and it is with the deepest regret that this Court experiences that situation in this case, because this Court is convinced that you seem to be laboring under a false impression here. You repeat and say over and over again that because of the assignment given you, you have no power to do anything with the property involved in the assignment except that given you in the assignment itself, and you don't seem to realize and understand the provisions of the Bankruptcy Act in a proper case terminate that power given you as Assignee for the Benefit of Creditors, and requires him to do something else, namely, to deliver up possession to the person des-

ignated by the Bankruptcy Court. The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the Assignee should do with the property. It is so simple that it doesn't even permit of argument. The Bankruptcy Act vests the Bankruptcy Court with authority to require an Assignee to do certain things; and after a hearing and an admission on your part that you had the status of Assignee for the Benefit of Creditors under a General Assignment, an order was made directing you to turn the property over to a designated trustee, and you have failed to do so, and there is nothing remaining for this Court to do except certify you for contempt.

Mr. Durst: In that connection I move for a continuance of two weeks.

The Referee: The motion is denied.

Mr. Durst: Also, in that connection, to be permitted to offer here in this matter the Answer of the Assignee in the State Court action, which suit has been referred to in this proposed real property arrangement, that being Superior Court action transferred to Los Angeles, entitled:

"In the Superior Court of the State of California, in and for the County of Los Angeles, No. Transferred to Los Angeles, S.F.C. 914. Answer of Walter C. Durst."

The Referee: Your offer is denied, on the ground that it is entirely immaterial.

Mr. Siemon: I can't see why Mr. Durst doesn't turn this property over so we can administer it.

His attitude is bound to be disastrous and it keeps us from administering this property, and I don't see why he is so obstinate in obeying the order of the Court here.

The Referee: How do you propose to show this up, Mr. Siemon?

Mr. Siemon: The procedure seems to be that you issue an order to show cause on it.

The Referee: Have you prepared that?

Mr. Siemon: Yes, and we can give him some time and take it up on the 15th or any time thereafter. I don't believe there is anything in any of the rules to give counsel a chance to cavil about that.

Mr. Durst: Rule 7 of the District Court of the United States, Southern District of California, provides that all documents should be produced on both sides in a matter such as this, and particularly to the opposing counsel for approval.

The Referee: Rule 7 says: (reading)

"All findings, conclusions of law, judgments and decrees and all orders affecting title to or creating a lien upon real or personal property, all appealable orders, and such other orders as the court may direct shall be prepared in writing by the attorney or attorneys for the successful party, unless the judge shall order otherwise; and the same shall embody the court's decision.

"In the case of orders, judgments or decrees, in the space to the right of the title of the cause and under the number of the cause, counsel shall show the substance of the order, decree or judgment as

he desires it entered in the docket by the clerk as required by the FRCP, Rule 79(a) thereof.

"No document governed by this rule shall be signed by the judge unless opposing counsel shall have endorsed thereon an approval as to form, or shall have failed to file with the judge, within five days from the time of the receipt of a copy thereof, as such time is shown on the original or by affidavit of service, a written detailed statement of the objections thereto and the reasons therefor.

"Counsel, whose duty it is to prepare any such document, shall submit a copy thereof to opposing counsel who shall promptly (1) endorse on the original an approval, or (2) endorse a disapproval as to form, or (3) acknowledge thereon the date and hour of the receipt of the copy thereof. If objections are filed within the time limit herein, the judge may thereafter require the attorneys interested to appear before him or he may sign the document as prepared or as modified by him."

Now, do you desire to file at this time these reports, or take them with you?

Mr. Durst: I want them marked for identification.

The Referee: No, I will not do that. Do you want to file them here as your reports?

Mr. Durst: Yes.

The Referee: All right. That is all at this time.

[Endorsed]: Filed November 8, 1954.

[Title of District Court and Cause 60963-4.]

NOTICE OF MOTION TO EXPUNGE PURPORTED REPORTER'S TRANSCRIPTS of Hearings Before Referee July 7, and June 9, 1954, and Order Separate Verbatim Transcripts

To Siemon and Siemon, attorneys for the debtors, and the trustee, 259 Haberfelde Building, Bakersfield, California.

Please take notice that the undersigned will bring the hereinafter set forth motion on for hearing before this Court, in the courtroom of the Honorable Ernest A. Tolin, Second Floor, Federal Building, 312 North Spring Street, Los Angeles 12, California, on Monday the 15th day of November, 1954, at 10:00 o'clock a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, moves the court as follows:

(a) To expunge the purported reporter's transcript of the evidence taken before the referee in bankruptcy herein, on July 7, 1954, and June 9, 1954, during which said hearing of July 7, 1954, the respondent made application that the reporter prepare a transcript of said hearing which application was granted by the referee as to said hearing and the previous hearing of June 9, 1954; and

Said motion will be made on the following grounds: (1) that from said purported reporter's transcript are omitted important admissible parts

of the proceedings on said dates before the referee; (2) said purported reporter's transcript combines the two proceedings under one cover and omits to state the proceedings had on July 7, 1954, and the appearances at said hearings, in addition to the above mentioned omitted portions of said hearings; (3) said purported reporter's transcript does not comply with the provisions of Title 28 U.S.C.A. Section 753, in that same omits portions of the record verbatim by shorthand of admissible evidence actually taken at said hearings in open court in the presence of the referee and while said hearings were in progress and prior to the adjournment thereof; (4) said purported reporter's transcript does not comply with Bankruptcy Act, Section 39, in that same does not preserve the evidence taken; and (5) said purported reporter's transcript does not comply with the provisions of General Order 22.

Said motion will be based upon the records and files in the referee's office, the records and files in the Clerk's office, the affidavit of Walter C. Durst appearing specially and such other and further evidence as may be presented to the Court at the said hearing.

/s/ WALTER C. DURST,
Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff appearing specially.

/s/ MORRIS LAVINE,
Attorney for the Assignee
appearing specially.

It is ordered that the time of service be, and the same hereby is, shortened.

/s/ HARRY C. WESTOVER,
United States District Judge

AFFIDAVIT OF WALTER C. DURST APPEARING SPECIALLY

State of California,
County of Los Angeles—ss.

Walter C. Durst being first duly sworn, deposes and says: That he is Walter C. Durst, Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially;

That on or about October 18, 1954, at the invitation of E. B. Bowman, reporter, affiant went to Mr. Bowman's room in the Federal Building, was handed an unbound copy of a purported transcript by Mr. Bowman.

Affiant has not seen the purported transcript since said October 18, 1954, and makes this affidavit from affiant's memory of the hearings of June 9, 1954, and July 7, 1954, by comparing affiant's memory of said hearings with affiant's memory of the contents of the purported transcript.

That should any inaccuracy appear in this affidavit the same is inadvertent and upon any inaccuracy being discovered affiant asks leave to amend this affidavit to correct same. The purported transcript appears to have been prepared for the binding under one cover although two separate hearings

were had of two different proceedings on two different hearing dates, and there were different appearances on each date. The frontispiece appears to be for the hearing on June 9, 1954, and appears to recite the title of the cases, portions of the nature of the proceedings set for hearing on said day and the appearances at said hearing. The next page following the last page of the hearing of June 9, 1954, appears to be followed by the purported proceedings and colluquy of the hearing of July 7, 1954. No separate certificate appears for the purported transcript of the hearing of June 9, 1954. There is no frontispiece for the hearing of July 7, 1954 setting forth the title of the cases, the nature of the matters on the referee's calendar at said hearing, the appearances of parties and counsel at said hearing and a statement of the persons who addressed the court at the said hearing of July 7, 1954. There appears to be no separate certificate as to the said hearing of July 7, 1954. The purported transcript fails to set out the proceedings had, the discussion and argument verbatim, or correctly, or at all, respecting the application made by affiant for a reporter's transcript during the hearing on July 7, 1954, and the referee's granting of said application both as to the transcript for that day and the transcript for June 9, 1954.

The said purported transcript fails to set out the proceedings had, the discussion and argument verbatim, or correctly, in full, on the 9th day of June, 1954, in open court while court was in session and prior to adjournment.

Prior to the ruling by the court on the Order to Show Cause affiant asked for a copy of the Bankruptcy Act from which to read Section 2 a (21), whereupon a colloquy with the court ensued, which colloquy does not appear to be included verbatim, or correctly or at all in the purported transcript.

Prior to the ruling by the court or the order to Show Cause affiant spoke to the power of the Court under section 2 a (21), and the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all.

Affiant made application to the court that a copy of the order which the court announced would be made be served upon affiant in advance of the signing thereof, and the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting said matter.

The purported transcript causes it to appear that the hearing of the order to show cause was interrupted for the appointment of a trustee. This is not the way affiant recalls the proceeding. As affiant recalls the matter the appointment of a trustee was taken up after the hearing on the order to show cause was concluded and the appointment of the trustee selected by the debtors was opposed by P. M. Schwabacher at some length. The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, respecting same.

That the said purported transcript fails to set

out the proceedings had, the discussion and arguments, verbatim, or correctly, in full on the 7th day of July, 1954, in open court and while the court was in session, and prior to adjournment.

Affiant is informed and believes and therefore avers that a word typed in separately after line 13 on page 23, appears to be an addition to the answer made and the meaning of the answer appears to be changed.

The application respecting the stay of the proceedings was incorrectly reported. As it appears in the purported transcript it seems to appear that the application for the stay was made after the petition for review, but no application for stay was made prior to said hearing after the filing the petition for review.

Respecting the proceedings for a stay made during the hearing the purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all.

There was an offer of proof made in the referee's court with reference to a letter. In said letter written by Mr. Siemon to Mr. Kalpakoff during December 1953, in duplicate, Mr. Siemon informed Mr. Kalpakoff that he could send a copy of said letter to Mr. Lysle Greenman, the trust deed holder of the Rosamond Ranch, and expressed the opinion that if the Kalpakoffs' two ranches went to foreclosure it might be possible to buy them in cheaply, and avoid the general assignment, or words to that or similar effect. Mr. Greenman stated to affiant

that he had shown the letter to Sam Houston Allen his attorney. None of which was controverted by Mr. Siemon at the said hearing on July 7, 1954 and was introduced to show want of equity in the debtors who had brought about the present conditions by refusing to sell a ranch or ranches. Mr. Sam Houston Allen the said attorney was present in the courtroom on July 7, 1954, with reference to said matter and his appearance and discussion with the court are unreported. The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting same.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting charges by Mr. Siemon that affiant had filed these proceedings, affiant's reply that the debtors filed the proceedings with the assistance of Mr. Siemon, and the court's comment that he did not take that matter into consideration in his ruling, or words to that or similar effect.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all, respecting the request of respondent for leave to employ counsel.

The purported transcript fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all regarding the debtors proposed plan and affiant's response thereto.

Affiant pointed out in the proceedings on July 7,

1954, that the referee was shouting at affiant, which the purported transcript fails to disclose.

/s/ WALTER C. DURST,
Affiant.

Subscribed and sworn to before me this 12th day of November, 1954.

[Seal] /s/ VERONA TAFT,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 12, 1954.

[Title of District Court and Cause 60963-4.]

MOTION TO DISMISS CITATION FOR CONTEMPT

Comes now Walter Durst and moves this Honorable Court to dismiss the citation for contempt upon the following grounds, to-wit:

1. The Referee was without jurisdiction to cite the petitioner for contempt since the petitioner had given notice of a petition for review of the order of the Referee.

2. Mr. Durst appeared only specially in the bankruptcy court, and the court did not have jurisdiction, therefore, to proceed against him for the reasons stated in our opening memorandum and in our closing memorandum.

3. The Trustee and his attorney failed to bring

up a full and complete or proper record of the proceedings and failed and has failed to have an accurate record for consideration by this Court.

4. The Referee lacked jurisdiction, in any event, to order a turn-over of property unless and until a plan of arrangement was confirmed as provided by Section 475 of the Bankruptcy Act.

This motion is made upon all the records and files and papers and proceedings had in the above entitled cause and this motion.

Respectfully submitted,

/s/ MORRIS LAVINE,
Attorney for the Assignee for the Benefit of Creditors, Appearing Specially.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 15, 1954.

In the United States District Court, Southern District of California, Central Division

No. 60963-T and No. 60964-T.

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

ORDER OF DISTRICT JUDGE ON PETITION FOR REVIEW OF REFEREE'S ORDER

At Los Angeles in said District on the 29th day of November, 1954.

Upon the petition for review of the assignee for

the benefit of creditors appearing specially from the referee's order of June 15, 1954, and upon all proceedings had before the referee, and upon the files, proceedings and exhibits herein, and upon hearing counsel for the parties, it is

Ordered that the order of the referee entered June 15th, 1954, being Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in his Possession, be affirmed.

/s/ ERNEST A. TOLIN,
United States District Judge

[Endorsed]: Filed November 29, 1954.

[Endorsed]: Judgment docketed and entered November 30, 1954.

[Title of District Court and Causes 60963-4.]

ORDER VACATING APPOINTMENT OF COUNSEL FOR ASSIGNEE

An Order having been heretofore made herein appointing Morris Lavine as counsel in the above entitled matter for Walter C. Durst as common-law assignee for benefit of creditors, which Order was made ex parte without notice to debtors or the Trustee; and it appearing that said Order was inadvertent and without authority;

Now, Therefore, in consideration of the premises, said Order appointing Morris Lavine as counsel for

Walter C. Durst as such assignee is hereby set aside, vacated and annulled as of this date.

Dated: December 6, 1954.

/s/ ERNEST A. TOLIN,
Judge of the United States District Court for the Southern District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 6, 1954.

[Title of District Court and Causes 60963-4.]

ORDER ON MOTIONS AND APPLICATION OF ASSIGNEE

The several matters hereinafter mentioned having been heretofore presented, argued and heard by the Court, to wit: (1) motion of Walter C. Durst, common-law assignee for the benefit of creditors for an order setting aside the general reference in the above matters; (2) the motion of said Durst, as such common-law assignee for an order consolidating the above entitled matters; (3) the motion of said Durst, as such common-law assignee for an order allowing and approving the filing of one claim on behalf of all creditors; and (4) the objection and opposition of said Durst, as such common-law assignee, to the proposed arrangement and a proposed new arrangement; (5) motion of said Durst, as such assignee for a restraining order

preventing the trustee and debtor from interfering with his management of the estate; said Durst appearing specially and by his attorney Morris Lavine and the debtors and trustee appearing by Alfred Siemon, of the law firm of Siemon & Siemon; and all of such matters having been submitted to and duly considered by the Court, and the Court having announced its decision on such matters in open Court on November 22, 1954,

Now, Therefore, It Is Hereby Ordered that said motion for an order setting aside the general reference in the above entitled matter is hereby denied, and the Referee is instructed to proceed with all of his lawful duties in connection with the administration of said estate; said motion for an order consolidating the two above entitled estates is denied without prejudice to such motion being renewed before the Referee; the motion of the common-law assignee for an order approving the filing of one claim by him on behalf of all of the creditors is denied without prejudice to such motion being renewed before the Referee; the opposition to the debtors' proposed arrangement and the application of the assignee to be allowed to propose a new arrangement is denied without prejudice to the filing of such opposition and proposed new arrangement with the Referee if they have not previously been so filed and if, at the time of such filing with this Court, their filing with the Referee would have been timely and proper; and the motion of the assignee for a restraining order to prevent interference with

his management of the common-law assignment is hereby denied.

Dated: December 6, 1954.

/s/ ERNEST A. TOLIN,
Judge of the United States District Court for the Southern District of California

Affidavit of Service by Mail attached.
[Endorsed]: Filed December 6, 1954.

[Title of District Court and Causes 60963-4.]

ORDER DISMISSING CONTEMPT PROCEEDINGS

The matter of the order by Referee Benno M. Brink to Walter C. Durst to appear and show cause before the Hon. Ernest A. Tolin, Judge of the above entitled Court, why said Durst should not be punished for contempt for failure and refusal to comply with the Referee's Order of June 15, 1954, requiring him to turn over property held by him as assignee for the benefit of the creditors of the above named debtors, came on duly and regularly on adjourned hearing at 10 o'clock a.m. on November 29, 1954, before me at my Courtroom in the Post Office Building, in Los Angeles, California; Alfred Siemon, of Siemon and Siemon, appeared for the Trustee; and said Durst appeared specially in his own behalf and stated in open Court that he intended to and would comply with said Order; and said Durst having tendered in open Court a "Deed,

Satisfaction, Releases by Court Order" in compliance with the said Order of the Referee of June 15, 1954, the matter was set over to 3:30 o'clock p.m. on said day, and at the last mentioned hour Morris Lavine appeared specially for said Durst and said document was approved in open Court by counsel for the Trustee after certain corrections thereon had been made by said Durst and after same had been re-acknowledged by him in open Court;

Now, Therefore, It Is Ordered that said "Deed, Satisfaction, Releases by Court Order" so tendered and approved as aforesaid be and the same is hereby accepted as full compliance with the Order of Referee Benno M. Brink dated June 15, 1954, requiring said Walter C. Durst, as assignee for the benefit of the creditors of said debtors, to convey and deliver to William Chernabaeff, Trustee herein, the property described in said Order; and said Durst having thus purged himself of contempt in the disobedience of said Order, this contempt proceeding is hereby dismissed and said Durst is hereby fully exonerated.

Dated: December 7, 1954.

/s/ ERNEST A. TOLIN,
Judge of the United States District Court for the Southern District of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1954.

[Endorsed]: Judgment docketed and entered December 9, 1954.

[Title of District Court and Causes 60963-4.]

NOTICE OF APPEAL

Notice is hereby given that Walter C. Durst assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from all final orders and judgments of the United States District Court in the above entitled matter made and entered herein, including orders made on November 22, 1954, also on November 29, 1954, also on December 6, 1954, and also December 7, 1954, and particularly from the Judgment and order of the United States District Judge affirming the referee on Petition for Review of Referee's Order, made November 29, 1954, and entered November 30, 1954, and from all the final Orders on Motions and Application of Assignee of December 6, 1954, also from the final Order Vacating Appointment of Counsel for Assignee of December 6, 1954, also from the order and Judgment Dismissing Contempt Proceedings upon enforced compliance by the assignee under protest with the referee's order from which the aforesaid review was taken, made December 7, 1954, and entered December 9, 1954, and all proceedings had therein prior

to the judgment of dismissal of the contempt proceedings.

/s/ MORRIS LAVINE,

Attorney for the Appellant Walter C. Durst, assignee for the benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially.

[Printer's Note: Notice of Appeal in 60964 is the same as in 60963 above.]

[Endorsed]: Filed December 20, 1954.

[Title of District Court and Causes 60963-4.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 293, inclusive, contain full, true and correct copies of the documents listed in the index included herewith, which documents, together with the original Assignee's Exhibits A to O, inclusive, and the Reporter's Transcript of Proceedings held on June 9, July 7, November 8, 15, 22, and 29, 1954, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 9th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk
/s/ By THEODORE HOCKE,
Chief Deputy

[Title of District Court and Causes 60963-4.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 44, inclusive, contain the original

Special Appearance and Request for Notice of Entry of Orders, etc., filed June 11, 1954;

Petition of Trustee for Authority to Sell Real Property, filed December 23, 1954;

Order Directing Sale of Real Estate Free from Liens, filed January 12, 1955;

Petition for Review of Referee's Orders of January 12, 1955, and December 10, 1954, filed January 21, 1955, with the order of your referee dated January 21, 1955 endorsed thereon;

Referee's Certificate on Petition for Review of Orders Directing Sale of Real Estate Free from Liens;

Reporter's transcript of hearing of April 4, 1955;

Minute Order of the District Court dated April 4, 1955;

Order Denying Request for additional documents. Which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $.80, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 6th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk
/s/ By CHARLES E. JONES,
Deputy Clerk

[Title of District Court and Causes 60963-4.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 63, inclusive, contain:

Petition for Order Setting Aside Order of General Reference;

Petition by Assignee for the Benefit of Creditors for Order to Show Cause to all Creditors of General Assignment, etc.;

Petition by Assignee for the Benefit of Creditors

for Order to Show Cause to William Chernabaeff, Trustee, etc.;

Objections to Petitions of Jack P. Kalpakoff and Mary Kalpakoff for Real Property Arrangements;

Praecipe—Additional Designation of Record on Appeal (60963-T);

Praecipe—Additional Designation of Record on Appeal (60964-T)

Which, together with a full, true and correct copy of Section 422 Opening Proceeding Real Property No. 60963-T and No. 60964-T, Referee's Dockets in Case No. 60963-T and No. 60964-T, District Court Dockets No. 60963-T and No. 60964-A; and one volume of Reporter's Transcript of Proceedings had on Monday, September 13, 1954; all in said cause, constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 14th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy Clerk

In the United States District Court, Southern District of California, Central Division

No. 60963-T—No. 60964-T

In the Matter of JACK P. KALPAKOFF and MARY KALPAKOFF, Debtors.

TRANSCRIPT OF PROCEEDINGS
Los Angeles, Calif., Nov. 8, 1954

Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Assignee for the Benefit of Creditors: Morris Lavine and Walter C. Durst. For Debtors: Alfred Siemon. [1*]

The Clerk: No. 60,963, in the matter of Jack P. Kalpakoff, and 60,964, in the matter of Mary Kalpakoff.

Hearing on order to show cause restraining respondents from interfering with sale by assignee for benefit of creditors, of real property to fulfill purposes of general assignment by payment of creditors, et cetera.

Mr. Lavine: I am appearing on behalf of the petitioner and the general assignment.

May I ask the court at this time for leave, also, to have Mr. Durst, who is an attorney, to appear as one of the attorneys for the general assignment, in addition to myself.

The Court: All right. You mean he wants to argue, too?

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Lavine: What is that?

The Court: You mean he also wishes to make an argument?

Mr. Lavine: No. We may have some matters presented to the court I might forget or I might be tied up in some other court, and I didn't want the court to be delayed on any of these proceedings, due to absence. Under those circumstances, I want to be in the clear.

The Court: All right. The clerk will note the presence of Mr. Durst. And other counsel please note it.

If Mr. Lavine is unavailable at any time, Mr. Durst, I take it, will be available to fill in the breach. [2]

Mr. Lavine: That is correct, your Honor.

At this time, if your Honor pleases, these documents were served on opposing counsel in connection with this matter, but do not appear to have been filed. They are memorandums in support of the petition which has been filed with your Honor.

The Court: You want to file them?

Mr. Lavine: Yes. And also we would like, in support of our petition,——

Sit down, Mr. Siemon. You make me nervous.

Mr. Siemon: I am here in response to an order to show cause.

Mr. Lavine: I appreciate that. As soon as I am through, I will sit down and you will have your chance.

Mr. Siemon: If I am cited to answer an order to show cause——

Mr. Lavine: We are the petitioners, your Honor. I think we have the first duty to see that all our documents are in, and then he may respond.

The Court: Yes. The documents really should have been in before the petition for order to show cause was filed.

Mr. Lavine: They are in, your Honor, except they are in the previous proceedings and I want to make them a part of these proceedings, if that becomes necessary.

The Court: Actually I couldn't see, on my reading of [3] papers that are heretofore filed, this hearing today encompasses any new basic issues.

Mr. Lavine: If your Honor pleases, heretofore there have been offers of purchases of these properties.

Mr. Durst has been contacted by various people. We have a letter dated here October 14, 1954, by a realtor. We have had numerous calls to Mr. Durst for the possible purchase of this property. If he could proceed to make a sale uninterfered with, perhaps the whole matter might be terminated.

In order to do that, he felt that it was necessary to present these interferences, because the documents which have been heretofore offered in the previous proceedings, and which we now offer, renew our offer as to the six exhibits which were offered at the previous proceedings, A to F, in support of these proceedings, and also the amended schedules which have heretofore been filed we offer in these proceedings, and the original restraining order.

We only have here an additional written docu-

ment of Ralph C. Boyd, a realtor, dated October 14th, which we wish to offer in connection with the proposed purchase of these properties.

And a document that was offered before Referee Brink and submitted to him, and copy of which has been previously served upon counsel. [4]

A copy of the document that was filed before Referee Brink on April 29, 1954, and it is complete except the verification which was on it originally has not been copied here.

These are the documents we offer at this time in support of our petition, your Honor.

Your Honor has the other affidavits and supporting papers, showing there have been negotiations.

All Mr. Durst wishes to do is be uninterfered with in the matter of the proposed sale. And we want, of course, the record to be clear he is appearing specially and in this matter.

The Court: He is asking for a lot of relief for a man who is appearing specially.

Mr. Lavine: He is not asking for any relief, your Honor. It is the Cestui Que Trust that is asking for relief. He is asking not to be interfered with. That is our position, your Honor.

Mr. Siemon: Your Honor, please, your remark to the effect this petition offered nothing new is precisely and absolutely correct.

This petition on which this order to show cause was granted fails to state any fact whatever. And it certainly fails to state any fact that would authorize the court to interrupt the proceedings, which are basically before this court, and that is the

matter as to whether or not Durst [5] should be compelled to turn this property over, in accordance with the order of the Referee.

I had prepared, and I served on Mr. Durst's counsel this morning in court, the combination of an answer and demurrer. The substance of the matter is that, obviously, Mr. Durst can't make a sale and has no authority whatever to make a sale, unless the bankruptcy proceeding is dismissed or unless the order of the receiver, of the Referee to set aside this property is dismissed.

Now, let me say here we don't want anything whatever to do with Mr. Durst. He has been in this thing four years,——

Mr. Lavine: Five.

Mr. Siemon: He has been in this thing five years, and it went to pot, to use the language of the street.

He was faced with foreclosures on both mortgages, both trust deeds on the ranch. In the meantime we had commenced a civil suit in the state court, to terminate his trust, on the ground of fraud and mismanagement and incompetency.

Yet when these foreclosure proceedings were imminent, when the property had been advertised for sale and was about to be sold, he runs into this court and has these people file a petition under his guidance, so that he can save himself from loss of this property by the Chapter XII proceeding.

Immediately he gets that relief, he begins to welch on [6] the proceedings that he starts, and he only wants the relief that he got in the way of

saving himself from the loss of the property through this proceeding. And then he comes back and said, "Well, the court hasn't any jurisdiction."

He has the temerity to file a brief, the brief before your Honor, and a lot of papers. We were here on the 26th of July on this order to show cause, as to why he shouldn't be punished for contempt. He filed a brief and he smothered us, so to speak, with over a hundred pages of typewritten matter.

I filed my brief in 10 days. The contempt proceeding was to be submitted on a brief. He was to have—I don't know how many—10 days, but I am informed that he came in and got an order he would have 15 days after the transcript of the proceedings before the Referee was made. I think I got a copy of that.

Two weeks ago I was in the—I am stating this as an officer of the court, I am attorney for the trustee here—two weeks ago I was in this building and I asked the reporter in Judge Brink's department about whether that transcript had been made, and he said yes, it had been made and Mr. Durst was in to look at it but there was some complaint about it, there was something in it that was either error or something had been omitted from it, and he wanted his counsel to see it. And this reporter told he had called the [7] counsel a couple of times and the counsel hadn't come in.

But the brief has not been in yet. The brief is not here. Yet we had this matter up on the 26th of July.

Now, they come in with a lot of papers and, of

course, the trustee's counsel isn't remunerated until there is some money in the estate, and they swamp us, so to speak, with a lot of papers served on us this morning, and filed, which are repetitious and which are conclusions. They don't state any facts. They present this matter this way: He wants to act as sort of a partner with the court in the administration of this matter. He wants to go out and sell the property. He has to be told by a Referee upon good authority, under the law, to turn the property over, but he still wants to make an ex-parte sale.

Having started this matter himself, it looks to me like he ought to be estopped from making that kind of a request here, because when he went in to court on a Chapter XII proceeding he must have committed himself to go all the way.

The Court: Isn't the Chapter XII proceeding brought in the name of Jack P. Kalpakoff and Mary Kalpakoff?

Mr. Siemon: Yes, but counsel filed those papers for them. He prepared those papers for them.

Let me keep the court straight on that. I made this statement the other day: He filed the original petition and [8] he got the order staying and enjoining the sale.

Mr. Kalpakoff came to me afterwards and we filed an amended petition, because Mr. Durst had not listed the creditors. He had not listed the creditors. He had listed himself as the main creditor. We filed an amended petition.

He started this proceeding, he commenced this

proceeding. My clients, these debtors here, they know nothing about the legal phases of a thing of this kind.

Now, let's get down to this thing that we come in here this morning on. He says, first, he has got three pages in which he recites more or less matters that are already before the court, about the nature of the assignment, and so forth.

Then he says, in paragraph 7—he admitted that he was to operate when he took the assignment in '49—and he alleges in paragraph 7 that he decided not to operate in 1953 and has not operated in 1953 or 1954.

Now, then he alleges "* * * whereupon the assignor instituted litigation in the state court to block the sale, * * *"

Of course, that is a conclusion. It doesn't mean a thing from the standpoint of pleading.

But that suit in the state court was instituted for the purpose of, not blocking the sale, but for the purpose of terminating his trust on the ground of fraud, that he, as an attorney, representing these people, had an assignment [9] made to him, an absolutely, apparently ironclad assignment made to him as an attorney, while he was giving these people legal advice.

Then he, in addition to that, holds the property four years. He lets these people work it and turn the proceeds over to him, except for such as they need to live on.

We began this suit for the purpose of terminating this trust, which we definitely had a right to

do, and that suit is still pending. He says it is to block the sale. At that time there wasn't any possibility of any sale being made.

I may be overstepping my authority here, in stating these things, but he came back shortly afterwards with a sale for some sum of money, with a very small down payment and indefinite arrangements as to the balance of it. It was ridiculous and couldn't be accepted at all; we blocked that sale.

Then the next thing he claims that blocked the sale was the commencement of these proceedings. Obviously, Mr. Durst couldn't make a sale and give it good title with the state court action pending and a lis pendens filed, nor could he make a good title by making a sale now with these proceedings pending, and with that order of the Referee to turn over this property to the court.

Hence, the interference that is asserted right now is [10] the interference that may result from the state court proceedings and the interference that may result in this proceeding.

Now, the interference in this proceeding can be nothing more or less than the Referee's order that he turn over this property to the trustee, so he puts your Honor in a dilemma here.

What can you do? Can you dismiss the state court action and make an order that we abandon that state court proceeding? I think when we came into this court we brought all of these dirty wash into this court. I haven't dismissed the state court proceeding yet, but when this property is turned over to the trustee I will dismiss it, because I think

that this court in bankruptcy is adequate and efficient to handle everything between these parties that can possibly come up, including Mr. Durst——

The Court: I think, as we sit here now, that when the Chapter XII proceeding was commenced here, that that vested this court with total comprehensive jurisdiction in the matter.

Mr. Siemon: I think undoubtedly it did. I think there is no question about it.

And if there were any question about it, so far as Mr. Durst is concerned, I believe he would be estopped from asserting it, because he, as attorney, acting in the capacity [11] of an attorney, and also as trustee for these poor people over here, brought this petition into court for what? To protect himself from the imminent loss of these properties by foreclosure.

If, having done that, and then coming in, as they are doing now, and denying this court's jurisdiction, if that isn't a species of contempt of court I don't know what is. I really don't know.

I don't think your Honor has any authority here to grant any order on this petition, because, in the first place, they don't specify what the order should be. What should you do?

Could you say, "Referee Brink, set aside your order that this property be turned over to the court. Set it aside and let Mr. Durst go now"?

Then aren't we dismissing and releasing the assets, the corpus of this estate in bankruptcy? What control do we have over Mr. Durst making a sale?

If the trustee makes a sale, the trustee has to

come in here and file a petition to get it confirmed, and the creditors have notice of it. Is these anything in Mr. Durst's trust that gives the creditors or these people any protection at all?

He drew the trust and he did not specify in that trust what his powers should be, how they should be exercised. [12] He is an arbitrary trustee, under that trust, without any limitation whatever.

Why, he could sell this property. He has got an offer in here that I saw a minute ago for $15,000.00 on $50,000.00, or something like that, and the balance on terms.

We can't sell property like that. It is impossible to sell it. We must sell it for cash or some other assets that will come into this estate. It is impossible for us to administer in this bankruptcy with Mr. Durst holding this property. We can't do it. We just as well walk off and leave it.

The Court: How does the matter stand here on the contempt matter?

Mr. Siemon: Well, the record stands that I was to submit a brief after our argument. I submitted mine in 10 days. I think maybe I was a day late. I explained that to the clerk in the letter, and I sent the brief in.

They were to have 15 days, I think, to reply. And they haven't served me with any reply. As I stated a while ago,——

The Court: I haven't seen a transcript of the proceedings before Referee Brink.

Mr. Siemon: The transcript, the reporter told me two weeks ago he had it all ready, and that Mr.

Durst came in and said there was something omitted or some mistake.

The Court: Wasn't that a necessary part of your showing, [13] in order to procure a judgment of contempt here?

Mr. Siemon: No. I have a citation of the Referee. I have the certificate of the Referee. That is all I have to file, your Honor.

The Court: You haven't a certificate from the Referee on review of his order, have you?

Mr. Siemon: No. We have the certificate of the Referee citing it in here, citing him for contempt.

I think there are two certificates here. If your Honor please, may I say this: The substance of the matter before the Referee was simply this, "Mr. Durst, do you have any title to this property, other than as assignee for the benefit of creditors?"

No, he didn't.

Mr. Lavine: I understand that is an incorrect statement.

Mr. Siemon: It is not incorrect, if you please. The Referee questioned him as to what his title was, what his claim was, and he said he is an assignee for the benefit of creditors, and he commenced to argue the matter as to what his status as an assignee was, whether he held an estate or not.

And the Referee very aptly got down the section of bankruptcy act and read the section to him that applied to the power of the court to have him turn it over. And after a little talk, it didn't take over 15 minutes, he made the order. [14]

There wasn't any dispute, any matter disputed

there. He doesn't dispute anything now. He admits he is an assignee for the benefit of creditors.

Your Honor perhaps hasn't read the briefs, but the bankruptcy is very, very specific, that the court may order an assignee for the benefit of creditors to turn over the property to the trustee, and that the federal courts have taken the position that he is a mere agent for the debtor.

And after, I think, 27 pages of briefs, of authorities—I don't know whether your Honor has read them or not—27 pages of authorities of exhaustive matter, evasive matter, they haven't been able to cite a single case, not a single case from the federal courts or from the state courts that the Referee didn't have power to make that order.

I think it is a self-evident proposition. How in the world can this court administer in a bankruptcy estate like this, unless we have title? We can't go partners with him and have to go out and ask him, "Mr. Durst, in the federal court, can we make a sale of this property. Are you reasonable to making a sale," and that sort of thing. That would be sort of a surrender of jurisdiction, and it would be sort of a reflection on the court, to say we have to deal with a third party like that, and go out and give him the veto power as to whether we can administer this estate.

One thing more before I sit down, and I am going to [15] leave this to your Honor's decision after counsel answers, because I don't think my position here in the matter can be seriously disputed.

I have a party sitting here in the courtroom that will pay $45,000.00 cash for one of these ranches. He has got an offer in here, tentative offer, of part cash and part terms, and only a small part cash. We can't do that kind of business.

The only way we can sell this property and give a good title, your Honor, is for it to pass through the bankruptcy now on this proceeding.

In closing, I think your Honor would virtually be compelled to dismiss this bankruptcy proceeding if Mr. Durst is to not have interference like he wants. That is the issue.

Your Honor very wisely said, in the beginning, that this is simply a phase of that contempt proceeding, because if he is compelled to turn this over he has no right to sell. If he goes ahead and sells, then your Honor decided he doesn't, they would have to turn it over. That is the question. Thank you.

The Court: It would seem to me, Mr. Lavine, you can't run to the court and ask for its protection and then not be subject to its discipline.

Mr. Lavine: If your Honor pleases, we didn't run to the court for its protection.

The Court: Didn't you when you came in here under [16] Chapter XII?

Mr. Lavine: We didn't come in here under Chapter XII. Mr. Kalpakoff came in under Chapter XII.

The Court: You are now asserting some individual right of Mr. Durst.

Mr. Lavine: No. We are not asserting any in-

dividual right. We are merely, in view of the fact that they have come in here under a Chapter XII proceeding, and they have petitioned this court, we don't want Mr. Durst to be in contempt of this court, nor in violation of any position with this court.

We simply are seeking to have the relief which this court has, under its equity powers, to permit him to do what we believe his general assignment, made in good faith five years ago, authorized him to do.

Since they have come in here and sought the relief of this court, we wish to comply in every respect with any order of this court, to which we are required to comply, and to which we don't feel we want to be in violation of either the dignity or the right of this court.

Now, here is——

Mr. Siemon: Pardon me.

Mr. Lavine: Just a minute, Mr. Siemon.

Mr. Siemon: Let's clear this up.

Mr. Lavine: Let me finish my argument. [17]

Mr. Siemon: May I make interruption?

The Court: No, Mr. Siemon. Let Mr. Lavine finish. I know he interrupted you. He shouldn't have done it. I don't think you should, either.

Mr. Siemon: I think we can clear this up if I could ask a question.

Mr. Lavine: Here is the situation, your Honor pleases: Mr. Durst was granted a general assignment in this matter and became the general assign-

ment for the benefit of creditors under a common law assignment.

When a situation arose that the Kalpakoffs were seeking some relief, Mr. Durst, as trustee, told them what they could do. He told them to get their own counsel.

They did get their own counsel and that counsel has been vigorous in his handling of the matter, commendably vigorous. I don't criticize Mr. Siemon for making as good a fight as he can here. That is his duty.

But what they have sought to do right along is to interfere with sales, although they authorized sales.

In the documents before your Honor, you will find letters and confirmations and authority to Mr. Durst to sell these properties. Those authorities were consented to and every time he had a sale just about ready to be made—there was one sale for $75,000.00 to $80,000.00, and you will find the letter in the files, which are in the exhibits before your [18] Honor, where they corresponded about why they refused to let the sale go through. They still wanted to stay on the ranches. They wanted to maintain the ranches.

Now, there came a time where the creditors did not want to wait any longer and Mr. Durst felt it was his duty as the general assignee to sell those ranches, and he has had various sales offered.

In their application to this court, in their petition under the Chapter XII proceeding, all they set up as their interest is that of Cestui Que Trust.

They do not claim they have the rights of the general assignment, nor the rights of the creditors. They can't claim that. They have transferred that title to Mr. Durst.

Now, in connection with the authorities, I believe the authorities of the Supreme Court of the United States support our position, that this court lacks jurisdiction.

They were dissatisfied and commenced this action in the state court, to set aside the trust. There is no lis pendens pending at the present time, but there was one and that interfered with a potential sale of one of these ranches for $75,000.00. The minute that was filed, of course, the sale blew up.

And now we have Mr. Durst having other potential sales being offered to him, various bidders have contacted him. There have been five or six. He wants to try to sell these [19] properties and then pay off these creditors.

Now, in so far as the proceedings in the Referee's court are concerned, the reporter got up what purported to be a transcript and brought it over to me, and even the statutes were in error in the quoting of the statutes that were discussed. There were other errors and omissions and he finally late Friday, I think, filed it with the clerk here.

There was a controversy as to whether this reporter's transcript had to be certified by the Referee. It was our view, before it should be filed here, it ought to be certified as correct. The reporter said that the Referee didn't want to certify it since you

ordered it, and he was going to have it filed here without any certificate.

There was a controversy as to whether this re- referred to in that proceeding that never were sent up here or never were included. Those include the opposition which Mr. Durst filed before the Referee, which was filed on July 7, 1954, in the bankruptcy court. And there is also the affidavit in support of the opposition, which was filed on the same date. Neither of these have been brought up here.

The record has been incomplete, and we feel that the notes of the reporter have been both inaccurate and incomplete. And although he has filed what purports to be a document in reference to the proceedings, it omits what we regard as having essential matters that took place in the court below, [20] and we agree with your Honor that before there could be any citation for contempt there had to be a reporter's transcript, the complete transcript of the proceedings, so that your Honor could review them and see whether there had, in fact, been one.

In respect to the authorities, there are two Supreme Court authorities which I believe sustain us very clearly. I have partly gotten up my brief, but without the reporter's transcript I didn't feel I could file it with accuracy, and I felt that this court was entitled to those documents.

In the meantime we have these proposed offers for the property, and the only relief we are seeking, if any relief, is the right of not having any interference in this matter, in accordance with the general assignment.

We are not asking this court for anything. We are merely seeking our right to proceed, since they have brought the Chapter XII proceeding and their amended petition shows that Mr. Siemon has revised the original petition completely, and that since this is an amended petition, that is the only petition actually before the court for consideration.

I can give your Honor a list of authorities which I believe support our position as to our rights not to be interfered with, and that all that is left for the Kalpakoffs is a remainder Cestui Que Trust after the sale has been made. That is all they have petitioned this court to control or [21] supervise.

Now they come in and ask your Honor to take over everything. That isn't what their schedules show. Their schedules show that the only thing they claim is the equitable right of Cestui Que Trust. That is all they set up. They seek to broaden that.

The case of Mayer vs. Hellman, 91 U. S. 496, the Supreme Court said:

"There did, indeed, remain to them * * *"

The assignors "* * * an equitable right to have paid over to them any remainder after the claims of all creditors are satisfied."

Now, we deem that that right was sufficient to entitle them to raise the power of this court under Chapter XII, to preserve that equitable interest. But that is the extent to which this court, we feel, has or had jurisdiction in this matter.

We feel that we are entitled to an order permitting us to be not interfered with in any way in what we believe the general assignment holds, which

was made in good faith, and which was acted on over a period of five years.

The documents which have been offered in evidence, and I take it your Honor is receiving them in evidence for this proceeding, also, and they have heretofore been offered except this one letter——

The Court: Everything which has been filed will be deemed before the court.

Mr. Lavine: Thank you, your Honor. So I submit, your Honor, that in view of that fact that we should be permitted, if they have a proposed purchaser, there isn't any reason why Mr. Durst can't sell it. He has a general assignment, and if they want clear title and the sale is a good sale, I don't think we will have any problem about it.

What they want to do is remove all of Mr. Durst's rights and take them away, and all his obligations and take them away, and turn them over to a trustee in the bankruptcy court, which we respectfully submit there is no jurisdiction to do. And I intend to file with your Honor a series of authorities in connection with that matter——

The Court: When is the filing of the series of authorities going to end in this case and it be ready for submission? It seems to me it has been one of the scandals in the years past, that the Congress intended to overcome, that there had been delay and delay and these things had gone on largely for the benefit of the ones administering it. At least, it worked out that way. And I don't want it worked out that way in this case.

Mr. Lavine: If your Honor will grant this order, I think the properties will be sold.

The Court: The proposition having come into this court [23] through the Chapter XII proceeding, that you submit it or, at least, Kalpakoffs submitted themselves to the jurisdiction of the court, and Mr. Durst, having prepared and counseled that proceedings, is estopped to deny our jurisdiction.

Mr. Lavine: No, not acting as attorney and merely telling them what their rights are is not an estoppel. Certainly, he would be derelict in his duty as a trustee if he didn't advise them as to any possible procedure.

The Court: Wasn't he acting a bit in protection of his position as an assignee?

Mr. Lavine: Well, I assume that he was, your Honor.

The Court: Can you draw any other inference from the entire record but that he was?

Mr. Lavine: Yes, your Honor, I think you can. I think that it was certainly——

The Court: Can we do it, without being foolish? That is the tendency of the acts that were done. Doesn't it show that Mr. Durst was acting in protection of his interest for an assignee, with a right to compensation as such?

Mr. Lavine: I will not say, your Honor, it didn't serve his interest; it did. It served his interest there to prevent what was an imminent danger, but it was an imminent danger not only to—it was an imminent danger to the Kalpakoffs, because if they had been foreclosed there wouldn't

have been anything there at least for them to [24] receive, and he owed a duty to tell them, to protect themselves. If at the same time it protected his interest, it was something else.

Your Honor must bear in mind they had elected another forum in this matter. They had elected a plenary suit to try to oust him, and Mr. Durst certainly wasn't seeking the aid of this court to oust him from his position in charge of the general assignment. That certainly was not his object.

That is what they have tried to do, because he furnished them a crutch on which they might continue in their operations and continue in possession of the ranches, until they were sold. But in doing that, he didn't intend to deprive himself of the power to sell these ranches and to get the money and pay off the creditors, and let them have whatever balance there might be, and also to pay his own expenses for the cost of administration.

Mr. Durst calls my attention to a paragraph in one of the affidavits, which he desires me to call to your Honor's attention.

"That affiant is informed and believes, and based upon such information and belief, avers during, on or about December 1953, Mr. Kalpakoff received a letter from his attorney expressing his opinion that if both ranches went to foreclosure it might be possible to buy them in cheaply, and that a copy of this letter was sent to the trust deed holder of the Rosamond, [25] Kern County, 240-acre ranch."

And that came up after the hearing before the

Referee, to show want of equity in the Kalpakoffs in this proceeding.

And those facts were admitted and not denied, I am informed. I was not present.

Now, if your Honor pleases, it seems to me that the easy disposition of this matter is to allow Mr. Durst to go ahead and sell the ranches. One of the two parties has to sell. It is either Mr. Durst or the trustee.

Mr. Durst has had as many offers and as many, probably more than the trustee, your Honor. And I was informed at one stage one of the prospective purchasers had been sent down to Mr. Durst since our appearance before this court heretofore, and that he had been referred, I believe, by Mr. Siemon or by the Kalpakoffs; I don't know which.

Now, if your Honor pleases, the issue seems to be on the extent of the power and jurisdiction of this court which, I believe, this court has in respect solely to the interest of the Cestui Que Trust.

I think, that since they have the pendency of the state court proceeding, which is not dismissed, that they have elected that forum, as far as the plenary matters are concerned. So far as the sale is concerned, we are only here, your Honor, with a view to see if we can't effectuate something which we believe can be done if we obtain the orders sought by the [26] petition and the order to show cause here.

The Court: Now, Mr. Siemon, you had some thought here a few minutes ago when we asked you to wait until Mr. Lavine had finished his argument.

Mr. Lavine: May I add one other thought? The petition says if $130,000.00 can be received for the sale of the two ranches, that would clear up all the indebtedness and might leave—and the expenses, and might leave something for the Cestui Que Trust.

Mr. Siemon: As to the matter I wanted to interrupt about, I thought I would ask counsel if he denied that Mr. Durst actually prepared the original petitions in these matters.

After listening to him a while, I assume that he doesn't deny that. They are on file and they will show, I think, from the similarity of his title he did prepare them.

The Court: We are not sitting here to examine documents——

Mr. Siemon: No. As to the sales that will be made, we will not consent to Mr. Durst making any sale, as we do not see any need of it at all.

He is not under bond. He is not under control of this court. If he makes the sale, the court has no control over the money or anything of the kind. There is no reason why the sale can't be made by the trustee. If Mr. Durst has claims, we will concede that they may be paid. But this is the place to settle them and not after he gets money in his hands and, when [27] we have to go out and try to take it away from him, to bring it into court to get administration.

Now, finally, this whole business, I think, as your Honor has correctly surmised and concluded, is a phase of the order to show cause why he shouldn't

be punished for contempt. It is a phase of it, because if you make a general order that he be not interfered with, I don't think it would mean a thing, because it would virtually have to amount to a dismissal of this case.

The title companies are not going to pass this title with the state court pending and with this court pending merely upon an order, general order that the Kalpakoffs and the trustee stop interfering, whatever that means.

So I think it is vexation, it is sham and it is contemptuous to come in here to this court, to ask for this order, when the other order is pending and when they admittedly haven't filed their briefs.

There is one thing more I want to say, and I want to sit down. The affidavit he mentioned he wants in the transcript is in the files, and his objections are in the file in the bankruptcy court. He doesn't need them in the reporter's transcript.

Furthermore, I don't know of any rule that requires that the reporter make a transcript of the thing, when the Referee makes his certificate, as to what transpired, and he has done [28] so twice. He has two certificates on file.

I will submit it that way. I think we ought to have a ruling. This delay is just murdering us.

The Court: I agree, you ought to have a ruling one way or the other. But I have come to the bench and received here, oh, it looks like about 20 pages of new material, or, at least, material that is physically new, even if it is reiteration of the other,

and I should study that and figure it out. We will get a decision to you within 20 days.

Mr. Siemon: We have been smothered with papers. We have a file in my office that is six inches high of things. Apparently, Mr. Durst hasn't anything else to do and he sits down at his typewriter and writes up something and gets his counsel to sign it. You can tell all these papers, apparently, with one or two exceptions, were clearly prepared on Mr. Durst's typewriter, with his counsel signing them. They just flooded us. We have something else to do, you and I, too.

The Court: Mr. Lavine is an industrious man. I think he probably had a hand in it, at least.

Mr. Siemon: I doubt if he saw this petition before.

Mr. Lavine: Yes, I have.

Mr. Siemon: Before he starts another thing——

The Court: It looks to me a higher critic of Mr. Lavine's work would say that this is typical of Mr. Lavine's [29] draftsmanship.

Mr. Siemon: From a lawyer's standpoint, that is quite a biting criticism.

Mr. Lavine: No, it isn't.

Mr. Siemon: If you read this petition over, if it has an allegation of anything new, I will eat my hat out here in the square.

The Court: If that is true, we will not hold you to that.

Mr. Siemon: If that is a pleading in any sense of the word, I have practiced law for 45 years without knowing what pleading means.

One thing more. In this book Mr. Lavine typed and got, I think it was, your Honor or the Referee to sign an injunction against these people, making their foreclosure sale that is in the file—not Mr. Lavine. Did I say Mr. Lavine?

Mr. Lavine: Yes.

Mr. Siemon: I meant Mr. Durst. He got an injunction before Mr. Lavine came into this thing, and got an injunction preventing this foreclosure sale.

I am going to submit it and your Honor can do what you want with it. I know we can't——

Mr. Lavine: Whatever the last act charged consisted of, it certainly was of benefit to Mr. Siemon's client. He ought to be over here thanking Mr. Durst for that. If it weren't for that the property would have been disposed of and his [30] clients would have been out, and he would have been out, and maybe I wouldn't have to be here, either.

So far as the reporter's transcript is concerned, we would like the other two documents that Mr. Durst—the opposition and the affidavit to be sent up here. We are prepared to submit our briefs. We would like that.

We would also like the notes of the reporter brought up here. They are certainly incomplete, and we think they should be impounded here, because this is a contempt proceeding, and we will submit the brief within 10 days now. I have the brief practically written, except for the things that——

The Court: Whatever happened to the transcript

of the proceedings the last day we were here? I understood that was going to be written up.

Mr. Lavine: I understood they had been ordered.

The Court: The reporter told me they had been ordered and not paid for.

Mr. Siemon: 10 days is just that much more time.

Mr. Lavine: We have 15 days from the date the reporter's transcript is filed. It wasn't lodged until last Friday.

Mr. Siemon: Counsel don't need it and I don't think they will make any use of it at all. The essential question is undisputed.

Mr. Lavine: Oh, yes.

Mr. Siemon: The essential question here is whether it [31] is an assignee; it don't make any difference what kind of an assignee.

The Court: I don't know, having sat here now, having heard you both argue, who is going forward and make sales here. Whoever is, should go forward. This case shouldn't be delayed any further in its administrative aspects.

Mr. Lavine: I agree with your Honor.

The Court: I would like to get the matter decided before I come to the bench next Monday. Can't you get it in, Mr. Lavine?

Mr. Lavine: Well, if your Honor——

The Court: I know your propensity with transcripts is to have all kinds of trouble with them. It is just one of the things that happens. I suppose you are probably the busiest lawyer in town.

Mr. Lavine: So far the transcript——

The Court: Those things ought to be resolved so those transcripts, in so far as they are needed here, would be immediately available.

Mr. Lavine: If your Honor pleases, we would like it to be corrected in accordance with what we feel the true facts are, and we are entitled to that, before any order of adjudication on some of these issues is made further.

If your Honor pleases, in respect to the transcript here, [32] we would like the transcript of the last proceedings written up. As your Honor knows, in order to pay for it, there must be some authority to the general assignment to authorize the payment.

In view of that fact, as it is in this court, if you will permit the general assignment to pay for that transcript of the proceedings of the last hearing, we will ask the reporter to prepare it right away so your Honor can decide the matter.

The Court: I didn't ask for it. I understand you had ordered it.

Mr. Lavine: I understood it had been ordered, and when the matter of cost came up that issue came up somewhere in the proceedings. I had told the reporter that we wanted it, and to go ahead with it. And then the reporter apparently contacted Mr. Durst, who said there had to be an authorization from this court.

The Court: In view of the doubts that have been cast on my jurisdiction, I will make no order on that subject now.

How long do you want, each of you, to get in any-

thing further in the way of memoranda of law or transcripts?

Mr. Siemon: I don't want any more time. All I ask—I know your Honor is ready to do so—is read my brief I already have in. It is thorough and comprehensive.

I don't want any time. I want those people to be [33] required to get in some briefs. I think your Honor suggested next Monday they ought to be in here.

Mr. Lavine: I have two stenographers working on a matter for the court of appeals, your Honor. If your Honor will give me 10 days we will get it in within 10 days.

We would like to have your Honor order up the opposition and the affidavit that was filed in the Referee's court, as part of the exhibits in this case.

Mr. Siemon: If the court please, I object to any order in favor of Mr. Durst. He was in here before and wanted an order to pay his attorney something—I covered that in my brief—for obstructing these proceedings.

They had a petition, actually a petition in here for this court to order something paid Mr. Lavine for obstructing these proceedings. I think that is the height of presumption, myself.

And to order the Referee, or, the assignee to be authorized to pay out money for this, I think that would be beyond the power of this court entirely. Let him pay his own bills.

The Court: Has the transcript been prepared upstairs?

Mr. Lavine: It has been prepared, yes, your Honor.

The Court: All right. Since it has been prepared there is probably nothing more to do, except to point out a few minor corrections, if it needs correcting. [34]

We will hold this matter open until next Monday at 12:00 o'clock noon for a transcript and any further briefs which are desired to be filed.

Mr. Lavine: I didn't hear your Honor.

The Court: 12:00 o'clock noon for any further briefs and for any transcript you desire to file; next Monday.

Mr. Lavine: Your Honor, will you order up the other two documents, so they may be part of the records in this case?

The Court: All right. So ordered.

Mr. Lavine: The opposition which was filed on July 7th and the affidavit of Mr. Durst.

The Court: They might throw some light on understanding just what the issues were before the court at the time you made the order, which has been in effect appealed from here; simply to clarify our record, we ought to have them.

Mr. Siemon: I think so. They are in the file, I think, anyhow.

The Court: Let's get that done, Mr. Lavine, so we can have it next Monday.

Mr. Lavine: Yes, your Honor.

Mr. Siemon: I won't need to be present, will I?

The Court: No, it is simply a matter of walking in and filing the papers.

Mr. Siemon: All right. Thank you.

(Whereupon, at 12:15 o'clock p.m., Monday, November 8, 1954, an adjournment was taken to Monday, November 15, 1954, at 10:30 o'clock a.m.) [35]

The Clerk: 60,963 and 64, in the matter of Jack P. Kalpakoff and Mary Kalpakoff.

The Court: Welcome back, Mr. Lavine. I didn't realize you were coming here today and I am entirely in the dark as to what you are here for.

Mr. Lavine: The hour of 12:00 hasn't struck yet, your Honor. I am here in accordance with your Honor's instructions that all papers should be in.

There were some mailed by my office on Friday, and they have certain errors, typographical errors, and I would like leave of the court to correct them, since they have already been filed and the filing stamp placed upon them. They came in the mail this morning.

The Court: All right. It appears here you wish to make some corrections in the reporter's transcript.

Mr. Lavine: That is another motion. But the first matter that I have is to have leave to make a couple of corrections on the papers that were filed this morning, in a couple of words. One on page 11, line 6.

The Court: Of what document?

Mr. Lavine: On the document re Reply on behalf of the assignee for the benefit of creditors appearing specially.

The Court: That is a document composed by you? [37]

Mr. Lavine: That is right.

The Court: Leave is granted. Interline it here in ink.

Mr. Lavine: I want to insert one case in there, a Ninth Circuit case, that was omitted.

The Court: You can do that in ink, too, so I can look to that document instead of to my notes.

Mr. Lavine: Very well. Then the document that I filed on July 26, 1954, it appears somebody wrote in the words "Answer In", and it should have been —that is not my writing, but it should have been, "Special Appearance in Proceedings".

I would like leave of the court to make that correction in the document of July 26th. It reads, in the typewritten form, "Proceedings on an Order to Show Cause Why Assignee Should Not Be Held for Contempt in a Chapter XII Proceeding; Denial of Acts Constituting Contempt; Challenge to Order as Null and Void; Opposition to Proposed Plan of Arrangement".

I want, in place of the words "Answer In" the words "Special Appearance in".

The Court: You may insert those words.

Mr. Lavine: On the top of that same document, "Attorney for Assignee Appearing Specially."

The Court: Yes.

Mr. Lavine: If your Honor pleases, there are three other documents that I wish to introduce this morning and offer in [38] evidence. They were supposed to have been brought up, two of them were

supposed to have been brought up here. One is the original notice, together with the proposed plan of arrangement, which was filed in the Referee's court. That didn't get up here, so we are offering our own copy in evidence, and ask it be filed. And then we have——

The Court: Do you mean that the originals are in the Referee's file and just didn't get here?

Mr. Lavine: That is right.

The Court: You are completing then that file, at least, so far as its contents are concerned?

Mr. Lavine: That is correct, so far as this part of the contents are concerned, yes.

The Court: That may be permitted.

Mr. Lavine: Also, we are offering in evidence another document, which was filed in the Referee's court and which did not come up here, and that is Walter Durst's special appearance in the Referee's court.

And then we are offering a document here to assist the court, consisting of a summary of proceedings pending in the District Court, with a list of the exhibits. We have listed from the date the first proceedings came here on July 7th on. We think it will be of material assistance to the court.

The Court: The first you have just now mentioned, I [39] understand, is something from the Referee's file that just didn't get here for our hearing last week?

Mr. Lavine: The first and second——

The Court: That one is admitted as evidence. The second one is in the nature of a memorandum?

Mr. Lavine: No, the second one is a special appearance of Walter Durst, also in the Referee's file. That is also offered in evidence.

The Court: All right. Admitted.

Mr. Lavine: Then there is the third document, which was also given to the Referee by Mr. Durst in propria persona, and we offer it in evidence, which is the opposition by Walter C. Durst, which he filed in the Referee's court; and we offer it in evidence in this court to complete our file.

The Court: All right. I have some question about doing all of this in the absence of Mr. Siemon. Did he have notice of this proceeding?

Mr. Lavine: Your Honor continued the matter for the filing of all papers until today, and these are papers that were filed in the Referee's court.

We asked the court to have the clerk bring up, I think, two of these, and your Honor made the order last week. They were not brought up, so we, in turn, are offering—Is that correct, Mr. Durst?

Mr. Durst: Yes. [40]

The Court: You are simply bringing up things from the Referee's court, but in lieu of disturbing his file you are bringing copies of things in it?

Mr. Lavine: That is correct.

The Court: All right.

Mr. Lavine: As to these matters.

The Court: All right. They are admitted.

Mr. Lavine: Now, we have a motion, your Honor, on the calendar for today, which was noticed upon Mr. Siemon and mailed to him, and we have moved this court to dismiss the contempt proceedings on

the ground that no record of an adequate nature has been filed in this court. There has been no reporter's transcript furnished to this court in reference to any contempt matter.

The Court: I don't see that matter calendared here.

Mr. Lavine: Yes, it is on your calendar, your Honor.

All the clerks' minutes apparently show is the motion to expunge the transcript. We have filed a motion to dismiss the citation for contempt. Here is a copy of it, and if your Honor feels appropriately that Mr. Siemon should receive notice of it, further notice of it—this being a matter that has been pending and your Honor asked that all papers and everything in relation to this matter be in before 12:00 o'clock today—we would have no objection to your Honor continuing the matter for a week to enable him to present any [41] reply or any opposition, or anything else he may have, if he so desires.

The Court: Has he been served with this motion?

Mr. Lavine: Mr. Durst informs me he has been.

The Court: We will continue this matter for all further proceedings until Monday at 10:00 o'clock, Monday of next week, so Mr. Siemon may appear in opposition to this motion to dismiss, if he desires to do so.

Mr. Lavine: Very well, your Honor.

Now, if your Honor pleases, so that we may be clear on our record here, we offer the files and the

documents in each of the proceedings numbered 1 to 9, inclusive, in the summary proceedings, in support of the challenge to the jurisdiction, and in support of the motion to dismiss the contempt proceedings, together with all proceedings in said matters, and such orders as may be made thereon, particularly to show the want of equity in the debtors and the trustee.

The Court: It would seem to me that that offer should have been made when the adversary parties were all here.

Mr. Lavine: We have made it in the writings. I think it implies it in all the matters. It is simply a repetition now of all the matters we have before your Honor.

I am trying to get it down into a nutshell. I think all these matters have been offered from time to time, and separately, and scattered, and we tried to get a summary before [42] your Honor here this morning of each—There are actually nine matters before your Honor. We listed them as to dates and proceeding.

We have now tried to simplify it so your Honor may look at these things one by one and quickly come to your own definite conclusion.

The Court: It may be admitted.

Mr. Lavine: If your Honor pleases, may I make this one suggestion to the court for its consideration in its ultimate disposition of this matter:

That if the sale is made and ordered, as we suggested in my memorandum, which is now on file with your Honor, which your Honor has given leave

to correct in a few spaces, the sales would convert the corpus of this estate into personal property which could readily be distributed and would not be subject to the Chapter XII proceedings, since it would be converted into personal property, and then the case could be dismissed.

We simply offer that for your Honor's consideration. It may take a month, it may take two or three months for a sale of this property to be made at an adequate price by the assignee, but we think it can be sold at a price, not only that would pay all of the debts, but would be something for the Cestui Que Trust.

Mr. Durst has asked me to point out that there is no [43] denial that these properties are worth $130,000.00 and should bring that price, and that the total indebtedness on the properties plus the cost of administration, would run about $106,000.00.

The Court: Well, if they bring that price, then there should be something left for the Kalpakoffs.

Mr. Lavine: If they are sold on the competitive market. If they have to be sold, as I have pointed out in my memorandum, your Honor, if it is sold either under a hammer by bankruptcy trustee or foreclosed, of course, it won't bring anything near enough probably even to take care of the creditors, plus all the different costs of administration that run in. There wouldn't be anything left to pay probably either the Kalpakoffs or pay some of the costs of administration that have been incurred up to this time, in the five-year operation of the

ranches, let alone any legal fees that now should be due and payable and accrued.

The Court: Now, is the matter ready to stand submitted?

Mr. Lavine: Yes, your Honor, except for these corrections and your Honor's putting it over.

The Court: You have leave to make any interlineations in ink and initial them, and I will look at them this afternoon.

Mr. Lavine: Thank you, your Honor. Mr. Durst has asked me to call to your Honor's attention, also, the Lancaster [44] property which is now in a great state of boom in that area, that it might well be well subject to subdivision possibilities. That would bring a better price——

The Court: That is a different character than it had at the outset of, at least, the assignee's administration.

Mr. Lavine: Yes.

(Whereupon, at 11:45 o'clock a.m., Monday, November 15, 1954, an adjournment was taken to Monday, November 22, 1954, at 10 o'clock a.m.) [45]

The Clerk: 60,963, in the matter of Jack P. Kalpakoff and 60,964, in the matter of Mary Kalpakoff.

Further hearing on motion of assignee to expunge purported reporter's transcripts of hearings before Referee July 7 and 9, 1954, and order separate verbatim transcripts; and motion to dismiss citation for contempt.

Mr. Durst: The assignee is present.

The Court: All right. Then I will give you the court's ruling on these matters. There are a great many of them.

Mr. Durst: May I request the court's permission, before the court rules, to speak?

Mr. Lavine instructed me to prepare objections to the certificates.

The Court: Mr. Durst, this matter has been going on since August——

Mr. Durst: Yes, sir.

The Court: ——and anything which properly should have been presented to the court should have been presented before now.

It has been one of the great evils of the bankruptcy practice, which the so-called Bankruptcy Act, now getting old, is supposed to cure, that we get away from these interminable delays which hearken somewhat back to Jarness vs. Jarness. [47]

Mr. Siemon isn't here today. Mr. Lavine isn't here today. The case goes on and on. Every Monday I take something under submission, and by the next Monday there is a new motion. This estate can be gotten eaten up by motions.

We are going to rule on what is before us now and close it.

The motion for the common law assignee for order setting aside the order of general reference is denied. The Referee is instructed to proceed.

The motion consolidating the estates is denied without prejudice. I think they should be consolidated.

The administration of the bankruptcy matters is

generally before a Referee. Since we are sending it back to the Referee, I will let the motion be made there and the Referee can pass upon it. That is where the motion should have been made, in the first instance. You don't have to appeal from the Referee to get matters consolidated.

There is nothing to show it was ever presented to the Referee, but you have leave to present it there now.

The motion of the common law assignee for an order approving filing one claim on behalf of all creditors is likewise denied, without prejudice to its being renewed before the Referee.

Now, this matter of the debtors' proposed arrangement comes on here in rather a, not too tightly formulated estate. [48] It is difficult to see an actual motion in it, but the court treats the filing of the opposition to the debtors' proposed arrangement and proposed new arrangement as a motion by the common law assignee for leave to file such opposition and proposal with the court. Such motion is denied without prejudice.

That could be presented to the Referee in due course.

Now, I don't think that I was correct in appointing an attorney for you, Mr. Durst. You are not an officer of the bankruptcy court. You are a common law assignee, and Mr. Lavine came in and said, well, you should be represented and I just didn't think it through at the moment. I thought certainly you should be represented, and I went ahead and appointed Mr. Lavine attorney for you.

That order was improperly and erroneously made by this court, and it is vacated as of this date.

Everything which has come here on the certificate from the Referee, the Referee is affirmed as to all questions. If they have not been disposed of by the specific rulings, but they have come here on the certificate from the Referee, the Referee is affirmed.

The matter of the contempt, the common law assignee is found to be in contempt.

I will continue the matter until next Monday, to see if he comes into compliance. [49]

We just necessarily then must decide the common law assignee's motion for restraining order to prevent interference with his management of the common law assignment, that that motion is denied. It also is tied to the motion to dismiss the citation of contempt. That is, in order to do these things orderly we should take care of that, although it raises no new issue beyond what is raised in the contempt citation itself, so that motion is also denied. That means it is unnecessary for us to consider the motions you wish to bring on today, which are new.

Mr. Durst: I would like to speak to the court, if the court will permit me.

The Court: Yes.

Mr. Durst: I observed in the transcript last Thursday that on page 50——

The Court: Transcript of the hearing of this court?

Mr. Durst: Hearing of September 13th. That on page 50, in colloquy, that this transpired:

"Mr. Siemon: May I say a word about that? The Referee, under federal procedures, certifies the proceeding and he has done so.

"Mr. Lavine: That doesn't——"

He was interrupted.

"Mr. Siemon: There hasn't been any attack on that certification."

When I discovered this I called it to Mr. Lavine's [50] attention, and Mr. Lavine instructed—or I instructed Mr. Lavine, in writing, as attorney for the assignment, to prepare objections to the certificates.

Mr. Lavine considered the matter and instructed me to do it. And I prepared the certificates. I worked over the weekend. I have the certificates—I mean the objections. There are no motions, but I believe in justice the counsel—or, the assignee should be allowed to file these objections for the completion of the record. They are objections to these certificates which the Referee has filed. I think just in justice the certificates——

The Court: I referred the matter back to the Referee.

Mr. Durst: Pardon me, sir.

The Court: I referred the matter back to the Referee.

Mr. Durst: Yes.

The Court: And I am not going to take any further action on it unless it comes up here again on a further certificate from the Referee.

Mr. Durst: I beg your pardon. May I consult with Mr. Lavine, please?

The Court: Yes, but not in the courtroom.

Mr. Durst: Then may the matter be held open on the calendar for a short——

The Court: No, the matter is closed so far as this court is concerned, except for memorializing these rulings by [51] appropriate orders Mr. Siemon should draw.

The clerk will notify him to prepare orders according to the Rules.

Mr. Durst: May I have these documents marked for identification: "Objections to Referee's Purported Certificate Filed August 17th, 1954, and Purported Supplement Thereto Filed November 10th, 1954" and "Objections to Referee's Purported Certificate Filed July 7th, 1954".

The Court: They will be lodged with the clerk, so that anyone looking at the record will see what was offered.

Now, that brings to mind, also, Mr. Durst, that on your behalf there were various exhibits offered and received here at the hearings which have heretofore been had.

Those will be transmitted to the Referee, because if he is going to proceed further he should have a full record as to what went on here, and is necessary to his purposes.

Mr. Durst: I would like to address myself to the court on one further subject, if it is proper.

I appreciate the court's comment respecting the counsel. I would merely desire that the court, as an assistance to the assignee, designate such value as the court may fix on services which have been

rendered. Not fixing them by making an order, but the court is in the best position to know the value of these services, and it would be of material assistance if that might be done. [52]

The Court: Since I have no power, I don't think I should just talk.

Mr. Durst: Yes, sir. Thank you, your Honor, I will lodge these documents.

Could these documents be marked for identification, please, sir?

The Court: Yes. So ordered. State what the marking is, Mr. Clerk, so the stenographic record will be clear.

The Kalpakoff matter, I have closed, Mr. Lavine. I am not going to be talked into re-opening it.

Mr. Lavine: Only as to the time your Honor gave the assignee to purge himself.

The Court: All he has to do is sign a document which Referee ordered him to sign.

Mr. Lavine: If your Honor pleases, that may be the subject of an appeal, and your Honor gave him a week to purge himself. Could your Honor extend that time, in view of the holidays intervening?

The Court: No. If you want to appeal, you will just have to move. If Mr. Durst wants to avoid the judgment of the court for contempt, he will have to move.

This matter has been just edging along here with procedural steps since last August, and it was already in a stale state at that time.

I don't think the court should, or that the court,

in [53] the discharge of its duties, can extend the time any further.

Mr. Lavine: Very well, your Honor.

The Clerk: Assignee's Exhibits L and M; Assignee Defendant's Exhibits L and M for identification.

(Whereupon, at 10:15 o'clock a.m., Monday, November 22, 1954, an adjournment was taken to Monday, November 29, 1954, at 10:00 o'clock a.m.) [54]

The Clerk: 60,963, in the matter of Jack P. Kalpakoff, and 60,964, in the matter of Mary Kalpakoff, hearing re assignee purging himself for contempt.

The Court: Mr. Durst, what have you done or what do you intend to do?

Mr. Durst: Assignee appearing specially must have been under some misapprehension, on Friday the assignee appearing specially was prepared to present a petition to the Circuit Court for a stay, but upon checking with the clerk it was ascertained that the order had not been signed.

There was also a misunderstanding, further, by the assignee appearing specially that the matter was continued. In that case, the assignee appearing specially desires to object to the sufficiency of the evidence in support of the contempt and desires to offer a letter dated August 13th from Referee Brink, addressed to Siemon & Siemon, and the contents thereof, as the assignee appearing specially's next exhibit, which letter indicates the opinion that the order of June 15th was premature.

Mr. Siemon understands about the letter. I would appreciate it if the court could look at this letter. It is a photostat that is presented.

The Court: Mark it for identification. [56]

Mr. Durst: That would be N.

The Clerk: Yes.

The Court: This contempt proceeding was handled very loosely. The court was given to understand a lot of things were true, but stipulations were not very tightly or comprehensively worded, and evidence was very meager.

Seeing that everyone proceeded upon the theory that Mr. Durst had been ordered to execute certain instruments and had refused to do so, I took it that there was no contrary evidence.

Mr. Durst: The assignee appearing specially does now offer all of the exhibits, A through N, the exhibit just marked, in support of the special appearance of the assignee, and objecting to the sufficiency of the evidence in support of that motion, and the contents of all those exhibits, together with the contents of the schedules, original schedules in bankruptcy, and the amended schedules in bankruptcy.

The Court: What do you make of it, Mr. Siemon?

Mr. Siemon: In reference to his letter that he has introduced there, I am under the impression that the Referee was of the opinion that he could not order a turnover until the arrangement had been approved.

I replied to that letter—I am not sure it is in the [57] file—I presume it is in the Referee's file, to

the effect that the statute gave the authority to order the turnover to a trustee or some one else, and it wasn't necessary to have the arrangement approved first.

In view of that, I should like to say that if Mr. Durst means to infer by the Referee's letter that the turnover order could not be made until the arrangement was accepted, it would be impossible to get an arrangement, because we cannot deal with the property until we have title to it. So that the turnover order is a necessary preliminary to the acceptance of any arrangement.

I wrote the Referee to that effect, and I presume that letter is on file.

I should like to call the court's attention to it, and have it considered. That is all I have to say on that point.

On this other point——

Mr. Durst: May I resume then, your Honor, please?

The Court: After Mr. Siemon is finished, yes.

Mr. Durst: Thank you, your Honor.

Mr. Siemon: On the question of evidence, I had the letter from the clerk, which is in the Referee's file, concerning the rulings that your Honor made. I haven't seen this transcript, but the proceedings, as I remember them, and I think I remember them quite distinctly, before the Referee, were quite informal. [58]

There wasn't any evidence, in the sense of witnesses being sworn and testifying. The Referee simply asked Mr. Durst if he was held as assignee

for the benefit of creditors, and he replied that he didn't.

The Referee then got the bankruptcy act and they discussed the provision of Section 2(a) (21), and there was some little discussion between Mr. Durst, appearing specially, as to that title tied on to his appearance.

As to his title as an assignee for the benefit of creditors, there was quite a little discussion back and forth in the way of an argument between the Referee and Mr. Durst, and I personally didn't get a chance to say anything, because it wasn't necessary and the thing was perfectly clear, that he, without any question, held the title as the assignee for the benefit of creditors. Consequently, the question of evidence, the condition of the evidence is one which is not very important. He doesn't yet claim that he holds any other way, except as assignee for the benefit of creditors.

He makes certain—I will be through in just a second—objections or exceptions, or whatever you may call them, and files them here in great volume, about the condition of the record. But he doesn't state a single fact that has been omitted from that record that is of any importance, and his statements are mostly recitals and conclusions and arguments.

So far as I know, I haven't heard a single fact from him [59] that bears on material that bears on the question before the court, and that question is a very simple one, does he hold, as an assignee for the benefit of creditors. If he does, this court, by the authority of the constitution of the United

States and the Congress, has the power, and I think, if I may say so, it is the duty, because this estate cannot possibly be administered with Mr. Durst having his finger in the pie, if I may use that word.

The Court: Just what document is it that you seek him to sign?

Mr. Siemon: The Referee ordered him to sign deeds and bills of sale transferring the property to the trustee and to satisfy a $90,000.00 crop mortgage which he procured from these debtors. The $90,000.00 crop mortgage is entirely fictitious, and there has never been any sort of money paid for this crop mortgage.

Now, I prepared and brought with me a proposed order on the contempt matter, and I would like to have the record show I am delivering Mr. Durst a copy of this proposed order.

This order, I take it, is one that is not made every day, and I picked this out of a form book and adapted it to this case. I will leave it with the clerk as the order that I think the court——

The Court: That is the order adjudicating the contempt, which we pronounced here last Monday?

Mr. Siemon: That is right, yes. It contains a description of the property he is required to turn over, and provides that he do so at once, forthwith.

If he fails to do so, that he be apprehended by the Marshal and confined to the County jail until he obeys the order, with the provision that he may excuse himself from contempt by complying with the order, purge himself. I will leave that with the clerk.

The Court: Orders rest here for five days after they are lodged, and then the court reconciles whatever problems arise from objections which have been made as to the form, unless counsel approve the form of order.

Do you want the five days, Mr. Durst?

Mr. Durst: Yes.

The Court: Or do you want to approve the form.

Mr. Durst: I am not in a position to approve the form. I observe a variance in the purging paragraph from the original order of the 15th. I have only had a chance to glance at it, and we would like the opportunity.

In the meantime, I would be pleased to be permitted to finish my little talk.

The Court: Yes, you may do so.

Mr. Durst: Thank you, your Honor. This subject of civil contempt is most interesting. I refer to the case of Maggio vs. Zeitz, 333 U. S. 56, from which I would like to make [61] a short quotation.

"There is no such reason for different measurements of proof in contempt and embezzlement cases; consequently, the two are almost identical. Fine, imprisonment or both can result from a conviction of either. * * *

"All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt."

The evidence, which counsel mentions in his opin-

ion is absent, is very complete. Exhibits A to M, and all the contents thereof are offered by the assignee appearing specially, together with the amended schedules, and original schedules in support of the proposition that there is no proof whatsoever of the validity of the order of June 15th.

Furthermore, Exhibits L and M, which were presented on the 22nd, Exhibit L, if I correctly quote it, being "Objections to Referee's Purported Certificate Filed June 7, 1954," contains specific and detailed objections to the form of the certificate and the contents thereof.

This, as the assignee appearing specially stated to the court on the 15th of November, matter only came to his notice [62] during the week before, about the 10th or 11th or 12th.

The Referee filed a purported supplemental certificate on November 10th, and the admission of that objection was denied, and in view of the fact that the matter is continued on the calendar, the assignee appearing specially now moves the court that the objections to Referee's purported certificate filed July 7, 1954, be filed in the contempt proceeding.

The assignee appearing specially, in connection with the petition for review, which is before the court, also moves the court that the Exhibit N, being objections to Referee's purported certificate filed August 17, 1954, and purported supplement thereto, filed November 10, 1954, be marked Exhibit M for identification, and be filed in these pro-

ceedings, in view of the continuance and the present state of the record.

Now, these certificates attacking the sufficiency of the transcript go to the fact that it may well be that the original petitions filed by the debtor, upon which—they had no standing to file such petitions—both the petition upon which the additional order to show cause was had and the petition of the trustee, upon which the contempt proceeding was started, are accompanied by an oath that neither are verified, according to the laws of California.

The transcript of the proceedings on June 9th, at which time the original order to transfer and convey was entered, were never available to this court until November 10th. This [63] transcript and the transcript of the contempt proceedings on July 7th were ordered by the assignee appearing specially on July 7th.

The certificate of the Referee on the petition for review was filed August 17th, four or five days after this letter of August 13th. The letter and the opinion stated in the letter did not accompany the certificate.

No letter was received by the assignee appearing specially or by his counsel in reply to that letter, which counsel mentions.

Then this court, to get this transcript up here, made its order on September 13th and it was not until October 18th that the assignee appearing specially was able to inspect a purported transcript, and that only after the assignee caused the original minute order to be served by the United States

Marshal on the reporter. And when the transcript was exhibited to the assignee appearing specially it was found to be deficient in many material matters, by omissions therefrom, all of which are set forth in a motion to expunge that transcript, which was before the court at the last hearing.

Now, this assignee appearing specially has been put to a heavy burden. He welcomes all work he can get. It is very pleasant and delightful.

This assignee appearing specially has observed the diligence with which this court works, and the time and consideration [64] which this court puts into the matters that it attends to.

Taking example from that, this assignee appearing specially tries to do the same thing, and the only purpose, the only reason the assignee appearing specially is here at all is to carry out the trust which the debtors and the assignor cast upon him.

They invited him into their affairs. The assignee appearing specially did not invite himself in.

It is respectfully submitted that this matter is serious. It involves many serious things and should be carefully considered.

I would like to address the court's attention to a similar circumstance which occurred around the turn of the century, where an assignee for the benefit of creditors——

The Court: That was before our present bankruptcy law.

Mr. Durst: No, right after it started, 1899. It wound up in the United States Supreme Court. The

case of Louisville Trust Co. vs. Comingor, 184 U. S. 18. It went through 3, 4, 5, 6 previous cases.

It was held that the assignee for the benefit of creditors was an adverse party; the court had no jurisdiction over him. That is the point which is asserted here.

This case of Louisville Trust Co. vs. Comingor has been cited, that it is still the law.

It was cited in the case of Galbraith vs. Vallely, another [65] very leading case, which also dealt in an assignee for the benefit of creditors, and which held the court had no jurisdiction over him.

This Galbraith vs. Vallely is cited in Emil vs. Hanley, United States Supreme Court case, which is the leading law on the subject of Section 2(a) (21).

Now, Section 2(a) (21) is a most interesting section.

The Court: I am not going into those merits again.

Mr. Durst: I appreciate that, your Honor, but the Vallely case is cited in Emil vs. Hanley, the United States——

The Court: You are going into the merits again, aren't you?

Mr. Durst: I beg your pardon.

The Court: Don't do so, please. The Referee in bankruptcy ordered you to do certain things in the nature of a turnover order. You are judged guilty of contempt of court for not complying with that order.

Now, have you complied with it? You were given a week.

Mr. Durst: I must——

The Court: Just answer yes or no. Have you complied with Referee Brink's order to turnover? I don't want any argument. I want just an answer.

Have you complied with it or haven't you?

Mr. Durst: I hand to the clerk a letter dated November 29, 1954,—— [66]

The Court: Please, Mr. Durst, will you answer the question? I know you have legal objections, and we are going to protect them for you.

Mr. Durst: Thank you, your Honor. Yes, I have complied with it.

The Court: All right.

Mr. Siemon: May I ask——

Mr. Durst: I ask this document, which I have handed in, be spread upon this record in its entirety, a letter to your Honor delivering a deed, in accordance with the order, and that the contents, that the document itself be marked as an exhibit, Exhibit O, and that the contents of the letter and of the deed be admitted in support of the objections to evidence warranting the finding of contempt.

Mr. Siemon: This is a surprise to me.

The Court: Well, it is a surprise to me that a man would argue here to the extent that we didn't have any evidence, and that he was improperly found guilty of contempt, and then would undertake to purge himself from it.

The matter is continued until 3:30 this afternoon,

and I will look things over, Mr. Siemon. Possibly you are going to get along.

Mr. Siemon: Did you say 2:30?

The Court: I said 3:30. We are trying a case.

Mr. Siemon: In the meantime, I can look at that [67] (indicating)?

The Court: In the meantime everything that has been filed will be available to you.

Mr. Durst: I would like to make a—Your Honor stated my legal rights will be protected.

In furtherance of that—if I am improper in speaking, I will be admonished.

The Court: Mr. Durst, what I had in mind simply is, you were found guilty of civil contempt for failure to turn over as ordered.

Now, you don't just appeal from things of that kind. If you think you are right, you persist in your acts which the court declares contemptuous. The court then commits you to the custody of the Attorney General until you comply with the order. That is the usual thing.

You then procure a writ of habeas corpus and test it out on habeas corpus.

Mr. Durst: If the court would permit me, I would like to make a statement in that respect.

The Court: Well, we will take it up at 3:30.

Mr. Durst: May I make a short statement, please?

The Court: We will take it up at 3:30. The matter is continued until that time.

(Whereupon, a recess was taken from 10:30

o'clock a.m. to 3:30 o'clock p.m. of the same day.) [68]

The Court: Counsel, did you look over what Mr. Durst presented this morning as compliance?

Mr. Siemon: Yes, your Honor. He presented a long letter and a deed.

While the deed doesn't appear to have much to commend it in the way of form, it is probably sufficient except that the word "we"—w-e—is used for "23," line 9, page 2. That is the designation of a section of land, "We."

Mr. Lavine: You want "23" written in, in place of the word "we"?

Mr. Siemon: It doesn't make any sense the way it is.

Mr. Lavine: We will conform it to conform with the description, if that is agreeable with Mr. Durst.

Mr. Siemon: There is a long description there that I don't think has any place in the letter. It is sort of a wail after he has complied. He done it, notwithstanding. I think there are 23 "notwithstandings".

The Court: Mr. Durst has, no doubt, earned some fees and he wants to protect himself, you can understand that.

Mr. Siemon: I don't think that letter has any place in this record. I have this to suggest:—

The Court: There are a lot of things, Mr. Siemon, that come into these records that don't have any place in them. [69] Lawyers are forever saying things that are not, strictly speaking, germane to what they should do in regard to the proceedings.

Perhaps this is just one of those things. I will terminate it, and go forward with your motion.

Mr. Siemon: I would rather like to proceed in an orderly manner. The deed was ordered to be filed with the Referee. It is filed here now before your Honor makes any order on the contempt.

Now, I don't know whether he means to concede that the contempt order should be made or what becomes of the contempt order.

He has filed his deed, which is a substantial compliance with the Referee's order. I don't know just where I am.

The Court: Well, first, the matter before the Referee came up here on petition for review. During the day your papers have reached me, that is, the form of order that the court should make.

You don't find on the contempt. There are one or two other things that are not dealt with, which were before the court.

I thought you dealt too kindly with me when you said that in appointing Mr. Lavine it was an inadvertent error. I think it was just plain error.

Mr. Lavine: I disagree. I think the assignee had a right to his counsel. And in bankruptcy every act that [70] anyone does has to be approved by the court.

The Court: Of course, he has the right to have counsel and you did very well by him, Mr. Lavine.

Mr. Lavine: Thank you, your Honor.

The Court: I think each of you are entitled to some compensation. I don't think in a bankruptcy matter I have a right to appoint counsel for a com-

mon law assignee. That is a right which is governed by the common law which says Mr. Durst goes out and hires one himself.

Now, it might be—I don't know—that you are entitled to compensation out of the estate. I couldn't say. But certainly equity would indicate that, having rendered services here, that you are.

Now, we have, first of all, the problem of the sufficiency of the deed, which it would at first-hand appear to the court that there is a typographical error in it.

Mr. Lavine: We will correct that right now.

Mr. Siemon: Let that be done.

Mr. Lavine: We will do it right away.

The Court: Now, it has been notarized, hasn't it, acknowledged before a notary public in its erroneous form?

Mr. Siemon: It is notarized.

Mr. Lavine: However, it being a matter that this court directed, it seems to me that your Honor, as a magistrate, could acknowledge the correction of the typographical error. [71] We will raise no question about it. I think no one else can.

Mr. Durst will initial the correction, and if your Honor still wishes the notary to initial the correction, if your Honor will give us leave to take the deed out,—or we will have the notary come up here. As a matter of fact, the notary is available.

Mr. Siemon: I don't know that that is necessary.

The Court: I don't know that that is necessary. Let's have Mr. Durst initial the correction here in open court, and that should be sufficient.

Mr. Lavine: We will get the deed and we will correct the typographical error. We wouldn't need rubbers on lead pencils if mistakes weren't made, your Honor.

The Court: Well, it was a great invention.

Mr. Lavine: Will you examine it, Mr. Siemon, and see it complies with your request?

Mr. Siemon: It is all right.

The Court: It is a deed which will be recorded, isn't it?

Mr. Lavine: Yes, your Honor.

The Court: It might simplify things, so far as the recording laws of the state of California are concerned, if it simply be re-acknowledged.

I have a notary in my chambers who will take a new acknowledgment. [72]

Mr. Lavine: Very well, your Honor. We will have that done right away, if your Honor wants to have the notary to come out here, or any way that suits your Honor.

The Court: Mr. Bailiff, will you ask the notary to come in?

The Bailiff: Yes, sir.

The Court: I hope this situation works out so that the most is realized from the property, and that equity is done to all persons who have rendered services, even if those services have been supplanted by the performance of others.

Mr. Lavine: We hope so, too, your Honor. There is no question but that these ranches are worth $130,000.00. Whether they bring that under a forced sale is another question.

But with the proper supervision of the possible sale, we think they can bring at least $130,000.00.

The ranch that is out at Lancaster is certainly in an area that is rapidly booming and conditions that didn't exist when Mr. Durst took these properties over at the present time, as your Honor is probably aware, do exist, as the airplane industry is moving out there and jet propulsion is being developed in that area.

With the proper supervision of the sales of those ranches, that particular ranch, at least, as a subdivision property, could well bring in excess of $130,000.00,—with [73] both ranches. I don't know what that one could bring alone. I think it could bring a much greater price than at any time before. That is just merely a comment.

Mr. Siemon: Now we are talking, I hope you people are in a position to buy it at those prices.

The Court: Mr. Lavine is in a position to buy at those prices, but his preference for investment has run to another section of the county.

Mr. Siemon: We have not been able to get offers which would come——

The Court: Miss Leland, a deed has been executed and notarized. It appears to have a typographical error.

The grantor under that deed is going to correct the error. Then I think it should be re-acknowledged.

Will you take the acknowledgment?

Miss Leland: Yes, sir.

The Court: If it were a Superior Court, it would be taken by the clerk.

Mr. Lavine: Yes.

The Court: I don't know that the clerk of the United States District Court would qualify, under the recording laws of the state of California.

Mr. Lavine: I think one of them is——

The Court: I think they qualify by virtue of being notaries. It is essentially a California law, rather than a [74] Federal law.

Mr. Siemon: There is one matter that might be mentioned at this time.

The Court: It isn't an oath. It is simply an acknowledgment.

Mr. Lavine: Yes.

Mr. Siemon: Mr. Durst has signed carefully in each case as assignee for the benefit of creditors. I presume that that would be unobjectionable, but it might be possible that the title company wouldn't pass that. I am willing to try it that way.

The Court: Well, that is a capacity in which he has acted.

Mr. Siemon: That is very true. That is probably descriptive——

The Court: I think it is. I am sure, though, you will need before you get through here an order of this court affirming the Referee. You recall we had a review upon the Referee's certificate, and the order which he prepared, you did not have me affirm the Referee. It should be a separate order, and the court will.

Mr. Siemon: I will make a note of that.

The Court: You send one in and get Mr. Lavine's approval as to form.

Mr. Lavine: Mr. Siemon. [75]

Mr. Siemon: Yes. He is executing it. I will try to get by with it.

Let me see if I understand. He petitioned for a review, and that, you say my orders sent in didn't cover that.

The Court: I don't think they do.

Mr. Siemon: I will check on it.

The Court: It should be a separate order, because it was a separate proceeding.

We act as the appellate court for the referees in bankruptcy. This court affirmed the Referee there.

Mr. Siemon: I have no objection to this, if your Honor thinks it is satisfactory. I would like to have a copy of it.

It is ordered that the order of the Referee entered June 15, 1954, being order requiring, directing assignee for benefit of creditors, delivering property in their possession, is affirmed.

The Court: Is it satisfactory as to form?

Mr. Siemon: Yes. I scarcely see the necessity of it. I proceeded on the theory you had denied the petition for review.

There was an order to that effect in his file. This won't hurt it.

The Court: I think at worst it will just be surplusage. I don't see any reason for a formal judgment on the contempt matter. It might be, Mr. Lavine, helpful with respect to [76] your claim for fees in the bankruptcy proceeding.

If you find it presents an—or have your opponent do it and approve it as to form.

In the absence of that, people sometimes misconstrue these things, and I don't like to sign a judgment binding a faithful officer of the court in contempt.

Mr. Lavine: We are not interested in that. I don't want to collect any fees or anything involving your Honor signing an order, requiring your Honor to sign an order. If that becomes necessary, that part, I feel, very deeply toward my fellow brethren in the law in these matters. I would render that service to anyone who found himself in that unfortunate position.

Mr. Siemon: This leaves the thing open, and I suppose the proper order would be to recite these proceedings today and say, Mr. Durst, having complied with the order in open court, the contempt proceeding is dismissed.

Mr. Lavine: That would be agreeable.

The Court: Yes.

Mr. Siemon: I will send such an order to counsel and the court.

The Court: Send it to Mr. Lavine and he can note his approval on it, and he can send it on to the court.

If he disagrees, you can get together on some suitable language. [77]

Mr. Siemon: I will send it and your Honor can note the five-day period, and if he has any objection to it he can notify the court.

Mr. Lavine: Yes.

Mr. Siemon: I think that is all. Thank you very much for your patience.

The Court: Yes.

(Whereupon, at 4:00 o'clock p.m., Monday, November 29, 1954, an adjournment was taken.)

[Endorsed]: Filed February 9, 1955.

[Endorsed]: No. 14655. United States Court of Appeals for the Ninth Circuit. Walter C. Durst, assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, debtors, Appellant, vs. Jack P. Kalpakoff and Mary Kalpakoff, and William Chernabaeff, Trustee in Bankruptcy of the Estate of Jack P. Kalpakoff and Mary Kalpakoff, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed: February 9, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14655

In the Matter of the Estates of JACK P. KALPAKOFF (District Court No. 60963-T) and MARY KALPAKOFF (District Court No. 60964-T), Debtors.

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANT

Comes now the appellant Walter C. Durst Assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff appearing specially, and herein sets forth a statement of the points which appellant intends to rely upon on appeal:

I.

The Bankruptcy Court erred in ruling that Congress inherently and as Construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the general assignment and creditors of the general assignment of property and other rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States, and to alter, modify or change California law respecting a valid, irrevocable, common law general assignment the two ranches of which appraise at $117,835. Ever since November 25, 1949, appellant has been and still is the only person lawfully in the possession thereof, in which creditors whose claims total about $110,000, ($30,000 of which had no payment for

over five years four months) are fixed as to Liability and liquidated as to amount and are coupled with an interest in the general assignment in the execution of the imperative and unreleasable power of sale for the payment of their claims 100 cents on the dollar, if possible, the surplus to the resulting cestui que trust as their scheduled interest appears. That bankruptcy Act Section 2 a (21) as here applied is unconstitutional.

II.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to enlarge the only rights of Jack P. Kalpakoff and Mary Kalpakoff as resulting cestui que trust, which were the only rights which they asserted in their schedules in bankruptcy. The Bankruptcy Court, therefore, acquired no jurisdiction of the res by reason of their petitions under Chapter XII of the Bankruptcy Act. The Jurisdiction of the Bankruptcy Court could extend no farther than the allegations of the Petitioner in Bankruptcy.

III.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in

this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, particularly respecting the substantive law of trusts that the execution of a non-object of the power of sale of the general assignment is a fraud on the power of sale and deprives the creditors of the general assignment of the execution of the power of sale and the immediate payment of their claims 100 cents on the dollar, if possible, and the surplus, if any, to the resulting cestui que trust as their scheduled interest appears. Fraud in this connection does not necessarily imply any moral turpitude, but is used to cover all cases where the purpose of those who seek the execution of a non object of the power of sale is to effect some bye or sinister object, whether such purpose be selfish or, in the belief of the persons seeking to execute such non object of the power of sale is a more beneficial mode of dealing with the property than that provided in the general assignment. Where, as here, the debtors since 1952, through blocking sales, by suit and otherwise sought and seek the execution of the non object of the power of sale, to-wit, the development of one of two ranches through the sale or operation of the other in lieu and in stead of execution of the power of sale to pay creditors 100 cents on the dollar if possible, the surplus if any, to the resulting cestui que trust.

IV.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the Creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to modify, alter, or change vested rights of the creditors of the general assignment coupled with an interest in the imperative, unreleaseable power of sale by the execution of which the creditors whose claims total about $110,000, about $30,000 of which have had no payment for over five years and four months and except as their rights may appear in State Court suit may be exposed to the Statute of Limitations in Bankruptcy, which vested rights enable the creditors to be paid 100 cents on the dollar, if possible, the surplus, if any, to the resulting cestui que trust as their scheduled interest appears.

V.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to oust an assignee for the benefit of credi-

tors and compel him to assign assets to the trustee in bankruptcy in contravention of applicable substantive California law, to general assignment more than four months prior to bankruptcy.

VI.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in ordering the Assignee for the benefit of Creditors to turn over two parcels of land to the trustee in bankruptcy after over five years and four months. Such a proceeding would be inequitable since the creditors of the general assignment relied on the general assignment and, thus, as to the general assignment only, waived the right to proceed within the statutory time under State Court procedure to enforce their debts and compel the payment to them of the moneys due them under State Court procedure within the period of the Statute of Limitations, but preserved in the prior pending plenary State Court Equity receivership action to which they are made indispensible parties defendant by order of the State Court.

VII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a

(21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts illegally to alter, modify or change California laws forbidding acts in contravention of the express terms of a trust, forbidding the release of an imperative power in trust, and limiting attacks on a trust after three years by the resulting cestui que trust.

VIII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and particularly the protection of the four year statute of limitations which the prior pending State Court equity receivership suit tolls but which it may be possible for the debtors to assert in the Bankruptcy proceedings begun over four years and five months after the creation of the general assignment.

IX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the Creditors of the general assign-

ment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to alter, modify or change substantive law of trusts to enlarge the power of any court, except a court of equity as here invoked in the prior pending plenary State Court Equity suit, or otherwise to adjudicate the rights of the beneficiaries of trustee of a trust.

X.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to change, alter or modify the body of law which holds that a bankruptcy court lacks jurisdiction to administer by summary proceedings property in the possession of a third person who holds adversely and without consent to proceed, and appears specially and challenges the jurisdiction and withheld and withholds his consent to each all and every proceeding herein as binding on the general assignment or otherwise, except as to the administration of the scheduled interest of the resulting cestui que trust.

XI.

The Bankruptcy Court erred in ruling that Con-

gress inherently and as construed and applied in this case intended by Bankruptcy Act Section 2 a (21) to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempts to alter, modify or change the law of trusts respecting creditors as beneficiaries of a trust being indispensible parties to an attack on the trust created by the general assignment as ordered by demurrer sustained in the debtor's attack on the trust in the prior pending plenary State Court equity receivership suit, but overruled on motion to dismiss in the debtors' identical attack on the trust in the Bankruptcy Court.

XII.

The Bankruptcy Court erred in omitting to order all issues raised by the two identical attacks by the debtors on the general assignment, first in the State Court and second in the Bankruptcy Court, relegated to the prior pending plenary State Court equity receivership suit for the protection of the rights of the creditors and of the scheduled interest of the debtors as resulting cestui que trust in the surplus, if any, remaining.

XIII.

The Bankruptcy Court erred in denying restraining order, stay, and injunction to permit administration of the general assignment by appellant as trustee pending appeal without let or hindrance of

the resulting cestui que trust as their scheduled interest appears, and as their rights appear in the prior pending plenary State Court equity receivership suit and as the rights of the creditors therein appear being by order of the State Court named indispensible parties defendant in said suit, which suit tolls the four year statute of limitations as to said creditors claims, said suit having been at issue between the plaintiffs and the assignee since November 1953, but plaintiffs have never brought same to trial.

XIV.

The Bankruptcy Court erred in holding that the Court of Bankruptcy had jurisdiction to make the finding of contempt which is wholly unsupported by the evidence and is contrary thereto, where the appellant has complied with the turnover order by executing a deed, depositing same with the clerk and accounting in said turnover order required.

XV.

The Bankruptcy Court erred in denying stay, injunction and restraining order where the appellant had complied with the turnover order of June 15, 1954, by depositing deed with the Clerk of the District Court and accounting.

XVI.

The Bankruptcy Court erred in omitting to hold that the Referee in Bankruptcy and the Trustee in Bankruptcy and each of them are amendable to the Rules of the United States District Court for the

Southern District of California, and particularly rule 7 (a) and rule 204 (a) as to all matters originating in the Referee's office.

XVII.

The Bankruptcy Court erred in denying appellant's petition for leave to file one claim, for leave to oppose the debtor's plan of arrangement and for leave to propose a plan of arrangement under Bankruptcy Act Section 466, all without prejudice to the special appearance of appellant.

XVIII.

The Bankruptcy Court erred in vacating and setting aside the order appointing Morris Lavine as attorney for the appellant.

XIX.

The Bankruptcy Court erred in denying the petition to set aside the order of general reference herein.

XX.

The Bankruptcy Court erred in denying the Motion that the debtors and the trustee in bankruptcy are bound by the contractual obligations of the assignor with appellant.

XXI.

The Bankruptcy Court erred in denying leave to the appellant to file objections to the certificates of the Referee filed July 7, 1954, August 17, 1954, and November 10, 1954.

XXII.

The Bankruptcy Court erred in not reversing the turnover order upon the opinion of the referee expressed in the referee's letter of August 13, 1954.

XXIII.

The Bankruptcy Court erred in not expunging the purported reporter's transcripts of hearings before the referee of June 9, 1954, and July 7, 1954, and ordering verbatim transcripts of said hearings.

XXIV.

The Bankruptcy Court erred in making the turnover order of June 15, 1954, in that the same is contrary to applicable law, omits to provide that the trust and the power of sale created by the general assignment follow the land and that the trustee in bankruptcy is bound thereby.

XXV.

The Bankruptcy Court erred in holding that the Court of Bankruptcy had jurisdiction to supersede the prior pending plenary State Court equity receivership suit for the cancellation of the general assignment, turnover and accounting, which tribunal first acquired jurisdiction of the cause by the issuance and service of process more than four months prior to bankruptcy and is entitled to retain it.

XXVI.

The Bankruptcy Court erred in noticing for hearing during the time for appeal from the orders of

the District Court affirming the referee, and proceeding after appeal, to hear the amended plan of arrangement of the debtors, and to order sale of one of the ranches in furtherance thereof, while a creditor's objections to petitions of Jack P. Kalpakoff and Mary Kalpakoff for real property arrangements filed September 13, 1954 in the District Court remain undisposed of, and while similar matters are on appeal being denial of the motion of the appellant for leave to file objections to the plan of arrangement, for leave to file plan of arrangement under Bankruptcy Act Section 466, and for leave to file one claim in the debtor proceedings covering all claims of all of the creditors of the general assignment and the expenses of administration of the general assignment.

XXVII.

The Bankruptcy Court erred in granting the application of the trustee in bankruptcy for release of the valid live deed deposited with the Clerk by appellant.

XXVIII.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and attempt illegally to alter, modify or change the law as set forth in the California

Code of Civil Procedure Section 944, which reads:

"If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court."

XXIX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States and attempt illegally to alter, modify or change the law as set forth in the California Civil Code Section 870, which reads:

"Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other acts of the trustees, in contravention of the trust, is absolutely void."

XXX.

The Bankruptcy Court erred in ruling that Congress inherently and as construed in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The order is in violation of the due process clause of the Fifth Amendment to the Constitution of the

United States and attempt illegally to release, alter, modify or change the imperative power of sale of the general assignment being unreleasable by the law as set forth in the California Civil Code Section 1060, which reads in part:

"1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, * * *" (Emphasis added.)

XXXI.

The Bankruptcy Court erred in ruling that Congress inherently and as construed and applied in this case intended by the Bankruptcy Act to deprive the creditors of the general assignment of property and other rights guaranteed by due process of law. The orders are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and attempt illegally to alter, modify or change the statute of limitations being California Code of Civil Procedure Section 338 which limits an action by the assignor to cancel the trust created by the general assignment to three years; also the orders purport to enlarge the four month's period in bankruptcy within which the assignor, by voluntary bankruptcy, may destroy the general assignment created by the assignor.

XXXII.

The Bankruptcy Court erred in ruling that the Congress inherently and as construed and applied in this case intended by the Bankruptcy Act to de-

prive the creditors of the general assignment and the trust created thereby of their vested property and other rights guaranteed by due process of law. The Bankruptcy Act as here applied to the trust created by the general assignment is unconstitutional. The orders, and each of them, affecting the rights of said creditors, and herein appealed, are in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, to the extent that same attempt illegally to alter, modify or change the law respecting the termination of the trust created by the general assignment, as set forth in the California Civil Code Section 2279, which reads:

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

/s/ MORRIS LAVINE,
Attorney for the Appellant
Appearing Specially

[Endorsed]: Filed Apr. 19, 1955. Paul P. O'Brien, Clerk.

No. 14655

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Estates of
JACK P. KALPAKOFF (District Court No. 60963-T),
MARY KALPAKOFF (District Court No. 60964-T),
Debtors.

Petition for Rehearing of Motions to Reverse by Reason of Dismissal for Mootness and Recall of Mandate, With Suggestion for Hearing En Banc.

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
WALTER C. DURST,
639 South Spring Street,
Los Angeles 14, California,
Attorneys for Petitioner Appearing Specially.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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Debtors.

Petition for Rehearing of Motions to Reverse by Reason of Dismissal for Mootness and Recall of Mandate, With Suggestion for Hearing En Banc.

To the Honorable the United States Court of Appeals for the Ninth Circuit, Stephens, Fee, and Chambers, Circuit Judges, Being the Court as Constituted in the Original Hearing:

Comes now the appellant Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, and hereby, pursuant to the provisions of Rule 23, respectfully petitions for a rehearing of (1) Motion to Reverse and to Remand the Cause with Instructions to Vacate and Set Aside Orders and Dismiss for Mootness, and (2) Motion to Recall the Mandate, which said two motions were denied by Order dated November 2, 1955.

The petition for a rehearing of the said motions is based on the fololwing grounds:

1. The Court acted under a mistake of fact which nullifies the order.

2. The Court erred in matters of law and fact in arriving at its order.

3. The cause is appropriate for *en banc* hearing.

POINT I.

The Court Acted Under a Mistake of Fact Which Nullifies the Order.

A mistake of fact apparently lies in the use of the words in the order "citation for contempt." The District Court made a finding of contempt [R. 186] following a certificate of the referee of purported proceedings had before him. No citation for contempt was issued by the District Court.

The turnover order of the referee in bankruptcy was reviewed by petitioner by the filing of a petition for review [R. 30] which *ipso facto* removed the cause from the jurisdiction of the referee in bankruptcy under the doctrine of *Brown v. Detroit Trust Co.,* 193 Fed. 622. Following the filing of said petition for review, the referee in bankruptcy purported to certify petitioner to the District Court [R. 35]. Prior to the finding of contempt petitioner offered objections to the certificate and was denied his right so to do. The proceedings were without due process of law, guaranteed by the Fifth Amendment, United States Constitution, and in violation of his constitutional rights thereunder. Said objections to the certificates of the referee were offered [R. 184], were ordered lodged [R. 188], and were marked as Exhibits L and M for identification [R. 190]. It

appears the referee by letter dated August 13, 1954, indicated that the turnover order might have been premature [Ex. "N," R. 190].

Further mistake of fact apparently lies in the omission from the said order of the facts respecting the special appearances of the petitioner and the challenges made to the jurisdiction [Schedules in Bankruptcy, p. 12; R. 20; R. 22; Ex. "K"; R. 44; R. 71; Exs. "F," "O"; R. 200].

Further mistake of fact appears to lie in the inclusion in the title of the case in said order of the words "Jack P. Kalpakoff and Mary Kalpakoff, and . . ." It is believed that said persons have at no time entered their appearances in this appeal or any other proceeding herein, except in the proceedings instituted by them June 2, 1954 [R. 10 and 17], and from which petitioner filed a petition for review on June 23, 1954.

Further mistake of fact apparently lies in the omission from the said order of the facts respecting the prior pending plenary State Court equity receivership suit No. Transferred to Los Angeles S. F. C. 914 [R. 95, 106, 123; Ex. "E" pp. 223 to 235, answer filed; Ex. "I" sheet marked 1., Proposed Real Property Arrangement]. In said suit the rights of upwards of $110,000 total creditors appear to be vested while in bankruptcy many of the upwards of $30,000 of said creditors who have had no payment for over six years may be exposed to the statute of limitations.

Further mistake of fact appears in the omission from the order of reference to adverse claims of petitioner, appearing specially, of creditors indispensable parties respondent [R. 106]; of absence of consent by petitioner, appearing specially, to plenary proceedings in the bankruptcy court; and omission of reference to the scheduled interest of the debtors as resulting *cestui que* trust of the general assignment [R. 8-9], and the trustee in bankruptcy a marriage and blood relation of the debtors [R. 99] as successor resulting *cestui que* trust.

Further mistake of fact apparently lies in the omission from the said order of the fact that in California the trust created by the general assignment follows the land and that it is the duty of the petitioner under the doctrine of *Chittenden v. Brewster,* 69 U. S. 191, to preserve the trust created by the general assignment, and is entitled to have his expenses reimbursed in so doing.

Further mistake of fact apparently lies in the omission from the said order of the fact that the object of the general assignment [R. 14] is to sell the land, pay the creditors 100 cents on the dollar, if possible, pay the petitioner his commissions [R. 16] and as set forth in the schedules and amended schedules; pay the fees of Morris Lavine attorney for the petitioner [R. 14], the surplus, if any, to the debtors as resulting *cestui que* trust and the trustee in bankruptcy as successor resulting *cestui que* trust, as their scheduled [R. 8-9] interest appears.

POINT II.

The Court Erred in Matters of Law and Fact in Arriving at Its Order.

It is believed the order of November 2, 1955, was improvidently made in that while the word mootness appears in the heading of the order, it does not appear in said order that the appeal herein was dismissed for mootness, neither does it appear that consideration was given to the doctrine of *United States v. Munsingwear,* 340 U. S. 36, and *Acheson v. Droesse,* 197 F. 2d 574. As set forth in a document named "Opposition to Motion for Recall of Mandate" on page 4, lines 15 to 18:

> ". . . The question in the case at bar was moot before the appeal was taken, not by reason of some change in the law, but by reason of compliance with the order by movant . . ."

Under the aforesaid doctrine petitioner, by reason of the motion to reverse, is entitled to have the turnover order and all orders which "Spawned" therefrom reversed, vacated, and set aside and the proceedings dismissed, herein, and also orders in appeal No. 14907.

Furthermore, petitioner asserts that all contentions and authorities urged by petitioner are established as the law of the case by reason of the dismissal for mootness which implies there is no issue of fact to support a justiciable controversy, and the motions referred to in the order of November 2, 1955. See R. 211 to 225, and statement of points in appeal No. 14907.

POINT III.

En Banc Hearing.

In consideration of the authority of 28 U. S. C. Section 46(c) and the doctrine of *Western Pacific Railroad Case,* 345 U. S. 247, it is suggested that the within case is appropriate for consideration by all of the active Judges of the Court of Appeals for the Ninth Circuit. Said suggestion is made on the ground that the orders of the Division herein do not appear to be in harmony with holdings that an assignee for the benefit of creditors, may be an adverse claimant, which would create a division between this court and a Division of the United States Circuit Court of Appeals, Ninth Circuit composed of Gilbert, Morrow, and Rudkin, Circuit Judges, in the case of *Henderson v. May* (in the matter of George W. Coven, Inc.), 289 Fed. 192, and of the Supreme Court in *May v. Henderson,* 268 U. S. 111, 69 L. Ed. 870, and general assignment cases therein cited, notwithstanding Bankruptcy Act Sections 2a (21), 475, and 509, of the Chandler Act, which in no way effect the applicability of 28 U. S. C. Section 1652, and Rule 62(f) of the Federal Rules of Civil Procedure.

ARGUMENT.

Thus the language of the order creates a doubt as to whether the Court, after examining the facts of the case under consideration, concluded that facts respecting the "citation for contempt," omission of reference to "special appearance," inclusion in title of names of persons not appellees, omission of reference to mootness, were needful to support the contentions and authorities of petitioner.

> "The best and the only proper way of disposing of erroneous rulings is to promptly recall them when the opportunity for so doing is presented."
>
> *Wagnon v. Pease,* 104 Ga. 417 at 430.

The order of November 2, 1955, appears to have been obtained upon a false suggestion appearing in a document named "Opposition to Motion for Recall of Mandate," page 2, lines 10 to 16, which reads:

> "Movant petitioned the District Court for a review of the turn-over order and the order was affirmed on November 29, 1954. Thereafter, the movant was cited for contempt for failure to obey the referee's order and appeared in court in response to said citation on December 7, 1954, compiled with the referee's order, and the contempt proceeding was dismissed and movant was fully exonerated."

The asserted false suggestion found its way into the order of November 2, 1954, reading in part:

> ". . . A review of the turn over order was had to the district court and was affirmed. The

movant did not obey the turn over order and a citation for contempt issued against him. Thereafter he complied, and the contempt proceeding was dismissed and movant was exonerated."

In contemplation of law an order obtained upon a false suggestion is not the order of the Court, and may be treated as a nullity.

In re Rothrock (1939), 14 Cal. 2d 34, 92 P. 2d 634.

Mandate recalled for incorrect description of title.

Killian v. Ebbinghaus, 111 U. S. 798.

It is admissible in the circumstances for the Court of Appeals to change its first decision and correct the mistake.

Twin Falls Co. v. Caldwell, 266 U. S. 85 at 90.

Where an appeal is dismissed for mootness, any right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction in said appeal is *res judicata,* except that the appellant may avoid such *res judicata* as to each right, question or fact decided adversely to him by moving to reverse and remand the cause and set aside all orders and dismiss all proceedings involved in the appeal affecting the appellant.

United States v. Munsingwear, Inc., 340 U. S. 36;

Securities and Exchange Commission v. Harrison, 340 U. S. 908;

Acheson v. Droesse, 197 F. 2d 574.

For the above reasons, the Petitioner respectfully prays that this court grant a rehearing.

Dated, November 25, 1955.

WALTER C. DURST, assignee for the benefit of creditors, appearing specially, Petitioner.

MORRIS LAVINE, and
WALTER C. DURST,
Attorneys for Petitioner Appearing Specially.

Certificate of Counsel.

I, MORRIS LAVINE, attorney for petitioner, hereby certify that in my opinion the petition for rehearing is being prosecuted in good faith and is meritorious and is not being prosecuted for the purposes of delay.

MORRIS LAVINE,
Attorney for Petitioner Appearing Specially.

No. 14657

United States
Court of Appeals
For the Ninth Circuit.

EXCHANGE LEMON PRODUCTS COMPANY,
a Corporation,

Appellant,

vs.

THE HOME INSURANCE COMPANY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

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United States
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Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—4-8-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CLAYSON, STARK & ROTHROCK,
Citizens Bank Building,
Corona, California.

For Appellee:

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
HAROLD L. WATT,
803 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 13878-WB

THE HOME INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

THE EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

I.

That this Court has jurisdiction over the above-entitled action by reason of the following facts, the particulars of which are hereinafter more fully alleged:

A diversity of citizenship exists between plaintiff and the defendant and the amount involved in this action is in excess of $3,000.00 exclusive of interest and costs of suit.

II.

That the plaintiff, The Home Insurance Company, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York and was and is a citizen and resident of the State of New York, and [2*] is now and was at all times

*Page numbering appearing at foot of page of original Certified Transcript of Record.

herein mentioned authorized to do business in the State of California and to write policies of insurance in said State of California at all times hereinafter mentioned.

III.

That the defendant, The Exchange Lemon Products Company, is now and at all of the times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and was at all of the times hereinafter mentioned a citizen and resident of the State of California, and is now and at all of the times hereinafter mentioned authorized to and was actually engaged in business in the State of California.

IV.

That by reason of the facts hereinafter alleged there is diversity of citizenship between plaintiff and the defendant above mentioned.

V.

That the amount in controversy in this action exceeds the sum of $3,000.00 exclusive of interest and costs.

VI.

That on to wit, April 23, 1946, plaintiff, The Home Insurance Company, issued its Standard California Transportation Policy No. TR 338460 whereby, for the period from the first day of May, 1946, and continuously thereafter until cancelled at any time at the request of the Assured or by the Company by giving fifteen days' notice in writing

of cancellation, it insured defendant, The Exchange Lemon Products Company, subject to the terms and conditions of said policy, against loss or damage in the amount of $175,000.00 by Flood among other causes on loss of goods and merchandise, consisting principally of Essential Oils, Pectin, Fruit Juices and Citrus Fruit By-Products, the property of the Assured, or in which the Assured had an insurable interest. That said policy provided among other things: [3]

"The policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage."

VII.

That thereafter, by written endorsement dated October 1st, 1951, and attached to and forming a part of said Policy No. TR 338460, it was agreed that the Company's liability is not to exceed $200,000.00 on account of claims arising out of any common disaster and/or catastrophe at any time and/or location, all other terms and conditions of said policy remaining unchanged. That said policy continued in full force and effect at all times herein mentioned.

VIII.

That on July 13, 1951, a large and substantial stock of Citrus Fruit By-Products of the asserted value of $161,991.63, held for the account of the defendant (Assured) in Crooks Terminal Warehouse in Kansas City, Missouri, was allegedly lost by reason of a flood.

That an actual controversy has arisen between the plaintiff and the defendant as to whether said Citrus Fruit By-Products were in due course of transit within the meaning and terms of said policy at the time of said alleged loss.

IX.

That plaintiff has commenced this action and made the averments hereinbefore set forth in good faith and desires to have its rights and liabilities under said policy of insurance construed and determined to the end that it may proceed with the payment of the loss under its policy, if it is legally liable therefor. [4]

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that plaintiff may obtain relief in the premises and declaratory judgment as follows:

(1) For a declaration by this Court of the respective rights and duties and liabilities of the plaintiff and defendant upon the policy of insurance issued by the plaintiff and which are in this complaint described.

(2) That it be declared and adjudged by this Court whether the property damaged as alleged was in due course of transit at the time of said loss in such a manner that the loss clause of plaintiff's said policy applied and is effective.

(3) Plaintiff prays for such other and further relief as to this Honorable Court shall seem just and equitable, and for costs of suit herein.

Dated this 3rd day of March, 1952.

/s/ THOMAS P. MENZIES,
Attorney for Plaintiff.

[Endorsed]: Filed March 3, 1952. [5]

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 (c), defendant hereby demands a jury trial of all issues raised by the complaint, answer and counterclaim in the above-entitled matter.

Dated this 15th day of April, 1952.

CLAYSON & STARK,

By /s/ DONALD D. STARK,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 15, 1952. [10]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now defendant Exchange Lemon Products Company, a corporation, sued herein as The Exchange Lemon Products Company, a corporation, and for answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II, III, IV and V of the complaint.

II.

Answering Paragraph VI of the complaint defendant alleges that the term "in due course of transit" has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as "in transit storage" or "stoppage in transit" [13] as distinguished from local or terminal storage. Defendant further alleges that the phrase "but only while in due course of transit and not if such property is in storage" means, as a matter of trade usage, "only while in due course of transit within the scope of the railway tariff and not if in local or terminal storage."

Defendant further alleges in answer to said paragraph that said insurance policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and

that both of said persons knew of said trade meaning of the term "due course of transit" and discussed the same in connection with negotiations for said policy.

III.

Admits the allegations in Paragraph VII of the complaint.

IV.

Answering Paragraph VIII of the complaint defendant alleges that said goods destroyed in Crooks Terminal Warehouse were stored under the transit privilege provisions of said railway tariffs and that the same were in due course of transit within the said trade meaning of said term.

V.

For want of information or belief, defendant denies each and every allegation in Paragraph IX.

Wherefore, defendant demands:

1. A declaration that the said property damaged and destroyed was insured by said policy, and that plaintiff is therefore, obligated to pay said insured loss to defendant;

2. Judgment against plaintiff in the amount of $161,991.63, together with interest thereon from July 13, 1951; [14]

3. All other appropriate relief, together with defendant's costs of suit herein.

Dated this 9th day of January, 1953.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

Lodged January 10, 1953. [15]

[Title of District Court and Cause.]

AMENDED COUNTERCLAIM

Defendant Exchange Lemon Products Company complains of Plaintiff The Home Insurance Company and for cause of action by way of counterclaim alleges:

I.

That on April 23, 1946, plaintiff, The Home Insurance Company, issued its transportation policy No. TR 338460 whereby, for the period from the 1st day of May, 1946, and continuously thereafter until canceled at any time at the request of the defendant or by the plaintiff by giving fifteen days' notice in writing of cancellation, plaintiff insured defendant, Exchange Lemon Products Company, subject to the terms and conditions of said policy, against loss or damage in the amount of $175,000.00, by flood, among other causes, on loss of goods and merchandise, consisting principally of Essential Oils, Pectin, Fruit, Juices, [17] and Citrus Fruit

By-Products, the property of the defendant or in which the defendant had an insurable interest, or property which the defendant was covering for benefit of consignee even though merchandise may have been paid for and title passed to consignee, the interest of the defendant being that of a bailee for customer's goods.

II.

That on or about July 13, 1951, while said insurance policy was in full force and effect, a large and substantial stock of Citrus Fruit By-Products, subject to said Policy No. TR 338460, of the value of $161,991.63, was lost and totally destroyed by reason of a flood while said stock was located in Crooks Terminal Warehouse in Kansas City, Missouri, and while said stocks were in the due course of transit within the meaning of said policy.

III.

That said stock of Citrus Fruit By-Products, and the loss thereof, were insured by the provisions of said insurance policy, and more specifically, were insured by the following provision in said policy.

"This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage."

IV.

Defendant alleges that the term "in due course of transit" has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the [18] railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as "in transit storage" or "stoppage in transit" as distinguished from local or terminal storage. Defendant further alleges that the phrase "but only while in due course of transit and not if such property is in storage" means as a matter of trade usage, "only while in due course of transit within the scope of the railway tariff and not if in local or terminal storage." Defendant further alleges that the said goods destroyed on July 13, 1951, were stored under the transit privilege provisions of said railway tariffs.

Defendant further alleges that said insurance policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and that both of said persons knew of said trade meaning of the term "due course of transit" and discussed the same in connection with negotiations for said policy.

V.

That on or about September 21, 1951, defendant furnished the plaintiff with proof of its loss, and otherwise performed all the conditions of the said policy on its part.

VI.

That although defendant furnished the plaintiff with said proof of loss and demanded of the plain-

tiff the sum of $161,991.63, the value of the stock of Citrus Fruit By-Products lost by reason of flood as aforesaid, the plaintiff has not paid the same, nor any part thereof, and the whole thereof is due and unpaid from the plaintiff to the defendant.

Wherefore, defendant demands:

1. A declaration that the said property damaged and destroyed was insured by said policy, and that plaintiff is therefore, obligated to pay said insured loss to defendant;

2. Judgment against plaintiff in the amount of $161,991.63, [19] together with interest thereon from July 13, 1951;

3. All other appropriate relief, together with defendant's costs of suit herein.

Dated this 9th day of January, 1952.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Defendant.

[Endorsed]: Filed February 4, 1953. [20]

[Title of District Court and Cause.]

ANSWER TO AMENDED COUNTERCLAIM

Comes now plaintiff, The Home Insurance Company, a corporation, and for reply to defendant's amended counterclaim admits, denies and alleges:

I.

Admits the allegations in paragraph numbered I.

II.

Admits the allegations in paragraph numbered II except that it denies that said stock of said Citrus By-Products was lost or destroyed while said stocks were in the due course of transit within the meaning of said policy.

III.

Admits the allegations in paragraph numbered III.

IV.

Denies the allegations in paragraph numbered IV except [21] the allegation that said goods destroyed on July 13, 1951, were stored under the "transit privilege provisions of the said railway tariffs." Alleges that it is without knowledge or information sufficient to form a belief as to the truth of said allegation.

V.

Admits the allegations in paragraph numbered V except that the plaintiff denies that the defendant has performed the conditions of said policy on its part to be performed.

VI.

Answering paragraph numbered VI plaintiff admits that it has not paid defendant's demand or any part thereof, but denies that there is anything whatsoever due or unpaid, or due or unpaid, from plaintiff to defendant.

Second Defense

That said policy provided by its terms:

"This policy covers only while the property insured is in the due course of transit in the custody of:

"(a) Any railroad or railroad express company and connecting conveyances.

"(b) This policy also covers any movement by truck from warehouses or factories to points of loading, freight cars or freight depots.

"This policy also covers while on docks, wharves, piers, bulkheads, in depots, stations and/or on platforms, but only while in the custody of a common carrier incidental to transportation.

"This insurance attaches from the time the goods leave the factory, store or warehouse at initial point of shipment, and covers thereafter continuously, in due course of transportation, until same are delivered at store or warehouse at destination. [22]

"No officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written

upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached."

Third Defense

That if the defendant's goods were damaged while in transit in the particulars in its amended counterclaim set out or otherwise, that the same were not in the due course of transit at the time of sustaining said loss or damage, if any, and were not in due course of transportation, but on the contrary had arrived at their destination.

Wherefore, plaintiff prays that defendant take nothing by its amended counterclaim, that the same be dismissed, and that plaintiff have judgment for costs, and for such other and further relief as is just and proper.

Dated this 29th day of January, 1953.

/s/ THOMAS P. MENZIES,
Attorney for Plaintiff, The Home Insurance Company, a Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 4, 1953. [23]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED PRE-TRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. Byrne, Judge, the following admissions and agreements of fact were made by the parties and require no proof:

(1) Plaintiff, The Home Insurance Company, is a corporation organized and existing under and by virtue of the laws of the State of New York, and was and is a citizen and resident of the State of New York, and is now at all times authorized to do business in the State of California and to write policies of insurance.

(2) The Defendant, Exchange Lemon Products Company, is a California corporation authorized to and actually engaged in business in the State of California.

(3) On April 23, 1946, the plaintiff issued its transportation policy in manner and form of the policy [25] attached to this order, marked Exhibit "A" and by reference made a part hereof. Said policy was received by the defendant on or about the date it bears, and was thereafter read and retained without objection by the defendant and is still in the possession of defendant.

(4) James S. Jennings was, on May 1, 1946, and for more than one year prior thereto, an agent of plaintiff.

(5) Said policy was in full force and effect according to its terms and conditions at the time of the loss.

(6) On July 13, 1951, citrus fruit by-products of the value of $161,991.63 were held for the account of the defendant in Crooks Terminal Warehouse in Kansas City, Missouri, and had been so held for a period of from eight to ten months prior to said date.

On or about said July 13, 1951, a flood occurred which inundated said Crooks Terminal Warehouse and as a result of said flood said goods were totally destroyed. All of said goods so destroyed had been in said warehouse for a period of eight months or more prior to sustaining said damage.

(7) Said goods were shipped by way of Santa Fe Railway from Corona, California, to said Crooks Terminal Warehouse in Kansas City, Missouri, under bills of lading, copies of which are annexed hereto marked Exhibit "B." Title to said goods remained in defendant consignee at the time of their destruction by said flood. Said goods were situate in said warehouse awaiting future orders and at the time of their destruction no orders or shipping instructions in respect to the same had been received or issued by the defendant. [26]

(8) Within the time prescribed in said policy of insurance a proof of loss was filed by the defendant with the plaintiff and said claim has not been paid, or any part thereof, and after the receipt of said

proof of loss, the plaintiff made timely objections to said proof of loss.

(9) The applicable railway freight tariff during the period from their initial shipment from Corona, California, until their destruction was Western Trunk Lines Freight Tariff No. 403 B (Effective March 8, 1950), a copy of which is attached hereto, marked Exhibit "C," and by reference made a part hereof.

(10) The goods destroyed in said flood were carried on the records of Western Weighing and Inspection Bureau as transit freight. Photostat copies of said records are attached hereto, marked Exhibit "D" and by reference made a part hereof.

(11) The identical goods insured by plaintiff under its said transportation policy were also insured by plaintiff against loss by fire while in Crooks Terminal Warehouse under plaintiff's Home Provisional Stock Policy No. 901456.

Issues of Fact to Be Tried

1. If the Court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term "in due course of transit," [27]

(a) What was that trade meaning?

(b) Did James S. Jennings and Tom Borden, at or prior to the execution of said contract of insurance, have knowledge of such trade meaning of the term "in due course of transit"?

(c) Did James S. Jennings have authority to bind the plaintiff?

(d) Were the defendant's goods, which were destroyed in Crooks Terminal Warehouse "in due course of transit" within the meaning of said term?

(e) Were the defendant's goods "in storage" within the meaning of the contract?

(f) Was the ultimate destination of the goods determined at the time of their destruction?

Issues of Law

1. Is the defendant, Exchange Lemon Products Company, entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term "in due course of transit"?

2. Were the goods "in due course of transit" within the meaning of said policy at the time said goods were destroyed?

3. Were the goods "in storage" within the meaning of said policy at the time said goods were destroyed?

4. Was there any ambiguity in the terms of the policy defining the coverage afforded thereby?

The foregoing admissions of fact have been made by the [28] parties in open court at the pre-trial conference; and issues of fact and law being thereupon stated and agreed to, the Court makes this Order which shall govern the course of the trial unless modified to prevent manifest injustice.

Dated this 25th day of March, 1954.

/s/ WM. M. BYRNE,
Judge of the U. S. District Court.

The foregoing Pre-Trial Order is hereby approved.

/s/ THOMAS P. MENZIES,
Attorney for Plaintiff.

CLAYSON, STARK & ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Defendant. [29]

No. TR 338460

TRANSPORTATION POLICY

STOCK COMPANY

EXHIBIT "A".

INLAND MARINE DEPARTMENT

The Home Insurance Company

NEW YORK

ORGANIZED 1853

Amount $ PER FORM ATTACHED .... Rate PER FORM ATTACHED ...... DEPOSIT Premium $ 100.00

BY THIS POLICY OF INSURANCE

IN CONSIDERATION OF THE STIPULATIONS AND CONDITIONS HEREIN AND

of ...... - - - - ONE HUNDRED AND NO/100 - - - - - - - - - - - - - - - - Deposit: Dollars/Premium

Does Insure ...... THE EXCHANGE LEMON PRODUCTS COMPANY ......

Of ...... Street ...... CORONA, City ...... CALIFORNIA State

On all shipments as described herein made between

the 1st day of May, 19 46 and [illegible]

beginning and ending with Noon, Standard Time at the place where this policy is countersigned.

To an amount not exceeding ... - - - - PER FORM ATTACHED - - - - - - - - - - - - [illegible]

in any one casualty, either in case of partial or total loss, or salvage charges, or any other charges or expenses, or all combined.

On lawful goods and merchandise consisting principally of Citrus Fruit By-Products and materials used in their manufacture or [illegible] the property of the assured, or held by them in trust or on commission or on consignment, or on which they have made advances [illegible] sold but not delivered, loss, if any, payable to assured or order.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS AND TO THE CONDITIONS PRINTED ON THE BACK HEREOF WHICH ARE HEREBY SPECIALLY REFERRED TO AND MADE A PART OF THIS POLICY, BUT THIS POLICY SHALL NOT BE VALID UNLESS ENDORSEMENT A OR B IS ATTACHED HERETO, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto and no officer, agent or other representative of this Company shall have power to waive or be deemed to have waived any provision or condition of this policy unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached.

Provisions required by law to be stated in this policy.—This policy is in a stock corporation [illegible]

In Witness Whereof, this Company has executed and attested these presents this 23rd day of April, 1946 but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at LOS ANGELES, CALIFORNIA

[signature] Secretary. [signature] President

Countersigned this 23rd day of April 1946.

[signature] Agent 34

M-366 [illegible]
Printed in U.S.A.

TRANSPORTATION POLICY

This policy covers on lawful goods and merchandise consisting principally of Essential Oils, Pectin, Fruit Juices and Citrus Fruit By-Products, the property of the Assured or for which the Assured is entering into contracts for Consignee Clean-Cut Merchandise may have been paid for and title passed to Consignee, the interest of the Assured being that of a Bailee for customers goods. Loss, if any, payable to the named Assured.

This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, railheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage.

THIS POLICY INSURES, except as hereinafter provided:

I. While on land against loss or damage by (a) Fire, (b) Lightning, (c) Cyclone, (d) Tornado, (e) Flood, (f) Collision, (g) Collapse of bridges, (h) Derailment, (i) Upset or overturning of vehicles, (j) Theft, (k) Pilferage and/or Non-Delivery, (l) Strikes, riot and civil commotions, (m) Vandalism, malicious mischief and/or sabotage, (n) Rain, (o) Hail, (p) Windstorm, (q) Explosion, (r) Motor Vehicle, (s) Smoke, (t) Aircraft, (u) Sprinkler Leakage, (v) Leakage, (w) Earthquake, (x) Water, (y) Loading and unloading.

II. While on ferries and/or on transfers or lighters while on inland waterways, in addition to items (a) to (y) inclusive, General Average claims and/or Marine Perils.

This insurance attaches from the time the goods leave the factory, store or ware house (or are loaded for shipment) at initial point of shipment, and covers thereafter continuously in due course of transportation until same are unloaded at store or factory at destination. This policy covers both "incoming" and "outgoing" property.

THIS POLICY DOES NOT COVER:

(a) Accounts, bills, currency, deeds, evidences of debt, money, notes or securities; (b) Fresh Fruits; (c) Export or Import shipments which are covered for Ocean Marine Insurance by this Company. (d) Risks by mail, unless specifically stated herein.

THIS POLICY DOES NOT INSURE AGAINST:

(a) Loss or damage to goods by delay or by being spotted, discolored, moldy, rusted, frosted, rotted, soured, steamed, or changed in flavor, unless the same is a result of a peril insured against; (b) Loss or damage caused by the neglect of the Assured to use all reasonable means to save and preserve the property at and after any disaster insured against, or when the property is endangered by fire in neighboring premises; (c) Deterioration, inherent vice or loss of market.

This Company shall not be liable for any loss, caused directly or indirectly by (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; or (b) invasion, insurrection, rebellion, revolution, civil war, usurped power; or (c) seizure or destruction under quarantine or Customs regulations, confiscation by order of any Government or Public Authority, or risks of contraband or illegal transportation or trade.

It is understood and agreed that this policy covers shipments within the United States and/or Canada and/or Mexico, both to and from factories or warehouses of the Assured or to or from warehouses where the Assured maintains or may maintain stocks. It is understood and agreed that the liability of this Company under this policy shall not exceed the following limits of liability on any one railroad car or any one truck or any one location at any one time while (a) in the United States, $175,000.00; (b) Canada, $50,000.00; (c) Mexico, $10,000.00.

PREMIUM ADJUSTMENT AND REPORT OF SHIPMENTS. The Assured warrants that at the end of each month they will report to this Company the actual value of all "sales" during the previous month's period, and upon the total of all reported sales the Assured agrees to pay this Company premium at the rate of 2¢ per $100.00 of value. Such premium to become due and payable to this Company immediately upon the furnishing of such report of sales.

SALES—It is understood and agreed that "sales" shall be the gross sales of the Assured less sales of fresh fruit, and import or export shipments otherwise covered by Marine Insurance with this Company. It is understood andagreed this policy is not restricted in its coverage to property "sold" but is specifically extended to cover "incoming" and "outgoing" shipments, within the terms of the policy.

RECORD OF SHIPMENT. The Assured also agrees to keep a true record of all sales during this policy period and agrees to keep such record open to the inspection of representatives of this Insurance Company at all times during business hours.

CANCELLATION. This policy may be cancelled either by the Assured or by this Company upon giving 15 days notice in writing, and the Assured agrees to furnish this Insurance Company with an accurate statement showing a total value of all sales during the period covered by this policy, and further agrees to pay premium in this amount at the rate stated in the above Adjustment Clause. If the premium thus determined exceeds the initial premium paid, then amount of such excess shall immediately become due and payable to this Insurance Company, and per contra, any unearned premium (being the amount by which the initial premium exceeds the premium due), shall be returned to the Assured.

Cancellation of the strikes coverage granted under this policy may be made at any time by the Company giving 24 hours' notice of such cancellation, but strikes coverage shall continue on any property at risk under this policy at the time the cancellation of strikes coverage becomes effective.

ALL OTHER TERMS AND CONDITIONS OF THIS POLICY REMAIN UNCHANGED.

Attached to and forming part of Policy No. TR 338460 of THE HOME INSURANCE COMPANY, N.Y.

Issued to THE EXCHANGE LEMON PRODUCTS COMPANY.

Dated at LOS ANGELES, CALIFORNIA
MAY 1st, 1946.

33

Endorsement No. 1

Pacific Marine Department

Endorsement

Additional Premium $.....
Return Premium $.....

Transportation Policy
(Classification or Conveyance)

Effective: May 1st, 1946.

It is hereby understood and agreed that the clause entitled "Premium Adjustment and Report of Shipments" under the policy to which this endorsement is attached is changed to read as follows:

Premium Adjustment and Report of Shipments. The Assured warrants that at the end of each policy period they will report to this Company the actual value of all "sales" during the previous policy period, and upon the total of all reported sales the Assured agrees to pay this Company premium at the rate of 2 cents per $100.00 of value. Such premium to become due and payable to this Company immediately upon the furnishing of such report of sales.

Sales—It is understood and agreed that "sales" shall be the gross sales of the Assured less sales of fresh fruit, and import or export shipments otherwise covered by Marine Insurance with this Company. It is understood and agreed that this policy is not restricted in its

coverage to property "sold" but is specifically extended to cover "incoming" and "outgoing" shipments, within the terms of the policy.

It is further understood and agreed that the deposit premium under this policy is increased to $500.00.

Notwithstanding anything contained herein to the contrary, it is further understood and agreed that on shipments by railroad cars consigned to points and/or places in the United States and moving through Canada, this Company's limit of liability, subject to all the terms and conditions of the policy, is increased to $175,000.00 while in Canada.

Accepted: The Exchange Lemon Products Company.

By /s/ R. M. TUTHILL.

All Other Terms and Conditions of This Policy Remain Unchanged

/s/ J. ROSSI,
Marine Special Agent.

Attached to and forms part of Policy No. TR 338460 of The Home Insurance Company, New York, issued to The Exchange Lemon Products Company.

Dated at Los Angeles, California, May 8th, 1946.

Jennings Ins. Agency. [31]

Endorsement No. 2

Pacific Marine Department
Endorsement

Additional Premium $.....
Return Premium $.....

Transportation Policy
(Classification or Conveyance)

Notwithstanding anything contained therein to the contrary, it is understood and agreed that the first report of the actual value of all sales under the policy to which this endorsement is attached shall cover the period from May 1st, 1946, to November 1st, 1946.

It is further understood and agreed that the Assured will report the actual value of all sales on November 1st, of each year thereafter, for the preceding year, instead of as provided for in the policy.

It is understood and agreed that the policy to which this endorsement is attached shall be continuous until cancelled.

All Other Terms and Conditions of This Policy
Remain Unchanged

Attached to and forms part of Policy No. TR 338460 of The Home Insurance Company, New York, issued to The Exchange Lemon Products Company.

Dated at Los Angeles, California, October 31st, 1946.

Agent Jennings Insurance Agency.

/s/ J. ROSSI,
Marine Special Agent. [30]

CONDITIONS

1. **TERRITORIAL LIMITS.** This policy covers only within the limits of the United States and Canada and Mexico.

2. **VALUATION.** All goods and merchandise are, by agreement, valued at amount of invoice or if not under invoice, then at cash market value on date and at place of shipment, but this Company shall not be liable for a greater proportion of any loss or damage than the amount of insurance hereunder bears to 100% of the valuation of all of the goods and merchandise at risk at the time and place of any one disaster. Loss

3. **OTHER INSURANCE.** It is expressly agreed that this insurance shall not cover to the extent of any other insurance whether prior, simultaneous or subsequent hereto in date, and by whomsoever effected, directly or indirectly covering the same property, and this Company shall be liable for loss or damage only for the excess value beyond the amount of such other insurance.

4. **MISREPRESENTATION AND FRAUD.** This entire policy shall be void if the assured or his agent has concealed or misrepresented or shall conceal or misrepresent in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the assured or his agent shall make any attempt to defraud this Company either before or after a loss. [Policies issued in the State of Massachusetts are subject to the provisions of the Massachusetts Act of 1907 Chapter 570 Section 21.]

5. **MACHINERY.** In case of loss or injury to any part of a machine consisting when complete for sale or use of several parts this Company shall only be liable for the value of the part lost or damaged.

6. **LABELS.** In case of loss affecting labels, capsules or wrappers, the loss shall be adjusted on the basis of an amount sufficient to pay the cost of new labels, capsules or wrappers and reconditioning the goods.

7. **BENEFIT OF INSURANCE.** Warranted by the assured that this insurance shall not inure directly or indirectly to the benefit of any carrier, bailee or other party, by stipulation in bill of lading or otherwise, and any breach of this warranty shall render this policy of insurance null and void.

8. **NOTICE OF LOSS.** Every claim for a loss under this policy shall be immediately reported in writing with full particulars to the Home Office of this Company at 59 Maiden Lane, New York, N. Y., or to the agent of the Company issuing this policy, and a detailed sworn proof of loss shall be filed with the Company or its said agent within four months of the date of the loss. A failure by the assured to file either such claim or such proof shall invalidate the claim. All adjusted claims shall be due and payable thirty days after the presentation and acceptance of proofs of loss at the office of this Company.

9. **SUE AND LABOR.** In case of loss or damage it shall be lawful and necessary for the assured, their factors, servants or assigns to sue, labor and travel for, in and about the defense, safeguard and recovery of the property insured hereunder, or any part thereof, without prejudice to this insurance; nor shall the acts of the assured or this Company in recovering, saving and preserving the property insured in case of loss or damage, be considered a waiver or an acceptance of an abandonment. In event of expenditure for salvage, salvage charges or sue and labor expenses, the liability hereunder shall be limited to such proportion of such amounts as the amount of this insurance bears to the total value of the merchandise involved.

10. **SUBROGATION.** In all cases of loss the assured shall at the request of this Company or its agents assign and subrogate all their rights and claims against others to this Company to the extent of the amount paid by this Company, but shall not be bound to bring suit in the assured's name unless requested so to do by this Company and the assured further agrees to render all reasonable assistance in the prosecution of such suits. This Company shall not be liable for any loss which shall occur while the property is stored or compromised with others, who may be liable therefor.

11. **IMPAIRMENT OF LIABILITY.** Any act or agreement by the assured, either before or after loss, whereby any right of the assured to recover the full value of or amount of damages in any property insured hereunder against any carrier, bailee or other party liable therefor, is released, impaired or lost, other than such as is usual and usual but the insurer's right to recover the premium shall not be affected. The assured may, however, without prejudice to this insurance, accept the ordinary bills of lading issued by carriers whereby the liability of any railroad or express company is limited to $50.00 in any shipment but of less than 20 pounds weight on any shipment not exceeding $100 in value, or where the rate of freight is dependent upon a valuation limited to not less than $50.00 on each bale, case or shipping package.

12. **ASCERTAINMENT OF LOSS.** This Company shall not be liable beyond the cost of the merchandise insured hereunder as invoiced herein, and the amount of loss or damage shall be ascertained or estimated according to such value with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost the assured to repair or replace the same with merchandise of like kind and quality; said ascertainment or estimate shall be made by the assured and this Company, or if they differ then by appraisers as hereinafter provided; and, the amount of loss or damage having been thus determined the sum for which this Company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate and satisfactory proof of the loss have been received by this Company in accordance with the terms of this policy. It shall be optional with this Company to take all or any part of the articles at such ascertained or appraised value and also to repair, replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after receipt of the proofs herein required, of its intention so to do, but there can be no abandonment to this Company of the property described.

13. **APPRAISAL.** In the event of disagreement as to the amount of loss, the same shall as above provided be ascertained by two competent, and disinterested appraisers, the assured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

14. **REINSTATEMENT.** Every claim paid hereunder reduces the amount of insurance by the sum so paid, but it is a condition of this policy that in the event of loss, the assured agrees to pay the insurer additional premium or premiums at pro rata rates, on the amount of such loss and to reinstate the full amount of this policy, such reinstatement to take effect immediately upon the occurrence which occasioned the loss, and the charges therefor to be made from such date.

15. **CANCELLATION.** This policy shall be cancelled at any time at the request of the assured, or by the Company by giving fifteen (15) days' notice of cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having actually been paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate except that when this policy is cancelled by this Company by giving notice it shall retain only the pro rata premium. Notice of cancellation mailed to the last known address of the assured shall be a sufficient notice. The check of this Company, or its agents, when similarly mailed, shall be a sufficient tender of any unearned premium.

16. **SUIT AGAINST COMPANY.** No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the requirements of this policy, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state.

17. **AGENT OF ASSURED.** If any party or parties other than the assured have procured this policy, or any renewal thereof, or any endorsement thereon, they shall be deemed to be the agents of the assured and not of this Company in any and all transactions and representations relating to this insurance.

18. **ASSIGNMENT OF POLICY.** This policy shall be void if assigned or transferred without the written consent of this Company.

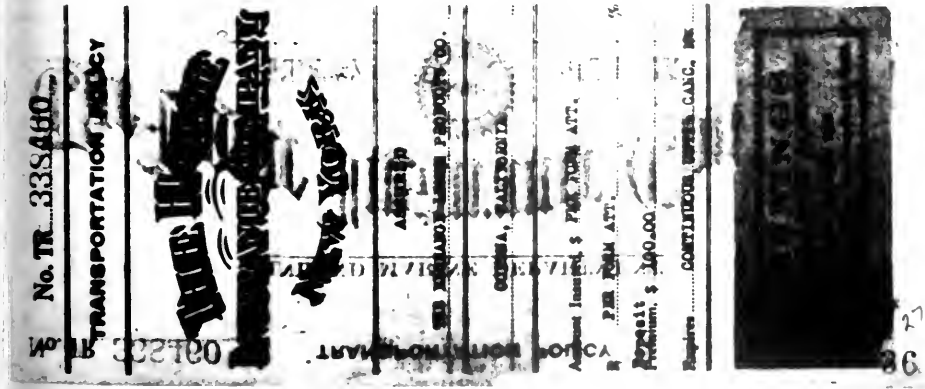

EXHIBIT B

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and it is not the Original Bill of Lading, nor a copy or duplicate, covering the property named herein, and is intended solely for filing or record.

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

FROM EXCHANGE LEMON PRODUCTS COMPANY

[illegible] At CORONA Calif., May 30 19 50 Customer's Order No.

By Santa Fe Railway Company

Consigned to Exchange Lemon Products Co. Shipper's No. 1878
%Crooks Terminal Warehouse Co. Term nal Dpt. 1007 Union Street
(Mail or street address of consignee—For purposes of notification only.)

Destination Kansas City State of Missouri County of

Route Santa Fe-UP Delivery

Seals: 4586339 - 4586340 Car Initial SFRD Car No. 1 407

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	*Weight (Subject to Corr.)	Class or Rate	Check Column
	Bbls. Citric Acid (Dry)			
	Kegs Citric Acid (Dry) "INITIALLY ICE, DO NOT RE-ICE"			
	Bbls. Citrus Pectin (Dry)			
	Drums Citrus Pectin (Dry) "REGISTER FOR ST RA IN TRANSIT"			
	Kegs Citrus Pectin (Dry)			
	Cases Citrus Pectin (Dry) "VENTS CLOSED TO DESTINATION"			
	Bbls. Sodium Citrate (Dry)			
	Drums Essential Oil			
	Cases Essential Oil (in tin)			
	Bbls. Citrus Fruit Juice			
	Kegs Citrus Fruit Juice (48-6)			
2310	Cases Citrus Fruit Juice (With Sugar Added)	66,70		
	Cases Citrus Fruit Juice (Frozen)			

WE CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL BILL OF LADING

EXCHANGE LEMON PRODUCTS CO.

J. C. BORDEN
TRAFFIC MANAGER

Subject to section 7 of conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per (The signature here acknowledges only the amount prepaid.)

Charges advanced:

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

EXCHANGE LEMON PRODUCTS COMPANY, Shippers

3

Agent

per Per

Permanent post-office address of shippers: Corona, Calif.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY Coast Lines

PREPAID FREIGHT BILL — ORIGINAL

FREIGHT BILL NO 147

CAR INITIALS AND NUMBER SFRD 11407 DATE MAY 30th 1950 AT&SF 619

STATION KANSAS CITY MO STATE FROM 12524 STATION CORONA CALIF

TO BELEN AT&SF
UN PAC DEL'Y

SHIPPER EXCHANGE LEMON PROD CO

To THE ATCHISON TOPEKA AND SANTA FE RAILWAY CO COAST LINE for
For Charges on Articles to be Transported

CONSIGNEE EXCHANGE LEMON PROD CO %
CROOKS TERMINAL WAREHOUSE

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc.)
INITIALLY ICED AT SANBERNARDINO
DO NOT REICE RULE 240
KEEP VENTS CLOSED TO DESTINATION

DESCRIPTION OF ARTICLES AND MARKS	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
210 CASES CITRUS FRUIT JUICE 48-6 SUGAR ADDED		66990	1.31	877.57		
			REFRGN	15.87		
		11500 LBS ICE	40 T	23.23		
REGISTERED FOR STORAGE IN TRANSIT			SWG	.60		917.27
					TAX	27.52
						944.79
#1878 ELF ORDER #319						

PAID 5-31-50 VO.#6118

WE CERTIFY THIS TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL PREPAID FREIGHT BILL
EXCHANGE LEMON PRODUCTS COMPANY

BY: T.L. HOPPEN, TRAFFIC MANAGER

Federal Tax

Received Payment _____ 19____ Total to Collect

Agent

EXHIBIT C

Freight Tariff No. 403-B

* * *

Note 3.—A transit station which is intermediate between origin and final destination via any authorized route in the applicable rate tariff will be considered intermediate between origin and final destination via all other authorized routes over which the same rate is applicable in the same rate tariff.

* * *

Rules Governing Transit Privileges on Canned or Preserved Food Stuffs Shown Herein

Item No. 55—Subject: Application.

(a) The transit privileges will apply only on shipments that are completely unloaded from cars at transit station and only when loaded out of the same transit house into which the shipment was originally placed except in the case of an actual transfer as provided in Item 115, paragraph (a) thereof.

(b) Transit Privileges will Not apply on shipments forwarded from transit houses to points within the switching limits of the transit station.

(c) Not more than One stop for transit privilege will be permitted between origin and final destination of the transited shipments.

Item No. 60—Subject: Terms, Definition of.

(a) The terms "Carrier's Agent" or "Carrier's Representative" includes Western Weighing and Inspection Bureau, or other supervising agency of the carriers.

(b) The term "Freight Bill" will also include Tonnage Credit Slips as defined in Item 160.

(c) The term "Point of Origin" means the point from which the local (flat nor proportional) rate has been applied.

(d) The term "Transit Rate" means through rate from point of origin to destination, authorized in tariffs lawfully on file with the Interstate Commerce Commission on interstate traffic applying on shipments accorded transit privileges.

(e) The term "Transit Station" means station at which transit privileges are granted.

(f) The term "Non-Transit" means commodities originating at the transit station or commodities for which no freight bills are surrendered.

Item No. 65—Subject: Recording of Inbound Freight Bills.

(a) As evidence of intention to make use of transit privilege, inbound paid freight bills covering tonnage received at the transit station

must be presented to the carriers' agent for recording within 30 days from date of inbound freight bill issued at transit station.

(b) When freight bill is presented for recording, agent of the carrier must stamp or write thereon "Recorded for Transit," date and sign the endorsement and make record of the freight bill.

(c) Freight bills must be recorded separately according to the commodity which they represent.

(d) When, for any reason, the shipper desires to retain original freight bill, duplicate, thereof, will, upon request, be issued by the carrier's agent, which may be used in lieu of the original. In all such cases the original must be stamped or endorsed "Not Good for Transit" and the duplicate "Good for Transit." [67]

* * *

Item No. 75—Subject: Furnishing, Storage, Facilities, Loading and Unloading.

Storage facilities must in all cases be furnished by consignee or his authorized agent and all loading and unloading of shipments must be done by and at expense of consignee or his authorized agent.

Item No. 80—Subject: Rates and Charges to Be Applied.

(a) The tariff rate from point of origin to

transit station will be assessed and charges collected accordingly.

(b) Rates from transit station to destination will be the difference between the rate assessed to the transit station and the transit rate applicable from point of origin to destination (see Paragraph c), plus additional charge, if any, for additional service, on basis of the transit weight, as authorized in lawfully published tariffs on file with the Interstate Commerce Commission.

(c) The through rate to be applied shall be the applicable rate in effect on date of shipment, viz.:

1. From point of origin to destination on the commodity into or out of the transit station, whichever is higher, or,

2. From point of origin to transit station on the commodity into the transit station, or,

3. From transit station to destination on the commodity out of the transit station, whichever is highest, plus transit charge and any other applicable charges, if any, as provided in tariff of carriers' parties hereto or their agent's lawfully on file with the Interstate Commerce Commission. [68]

* * *

Supplement No. 25 to Freight Tariff No. 403-B

Rules Governing Transit Privileges Shown Herein

Rule

* * *

Item No. 70-I—Subject: Time Limit.

Note 10—The time limit of freight bills covering shipments of Frozen Berries, Fruits and Vegetables and other articles as described in Section 2 of Item 50, transited at St. Louis, Mo., which under the provisions of this item or prior items, expire with or after September 14, 1949, but not later than September 29, 1949, is hereby extended for an additional period of one (1) year but not more than two (2) years from the date of billing from point of origin. Such freight bills must be presented to the carrier's agent prior to the expiration date and endorsed to secure additional time. For this extension an additional charge will be made equal to the difference in the rate in effect on date shipment left original shipping station and the rate in effect on date shipments leave the transit point, plus one (1) cent per 100 pounds for the extension. (Not Subject to Tariffs of Increased Rates and Charges Nos. X-162-166 Series Nor to Tariff of Increased Rates and Charges No. X-168-A as described in Item X-162-6-8, or successive issues thereof.)

* * *

[Endorsed]: Filed March 25, 1954. [75]

[Title of District Court and Cause.]

OFFER OF PROOF

The ruling of the Court, at the pretrial hearing on October 5, 1954, that no triable issues of fact exist in the above-entitled matter, precluded Defendant, Exchange Lemon Products Company, from offering any evidence in the case. Therefore, pursuant to permission granted by the Court at said hearing, defendant hereby submits its written offer of proof in said case.

Defendant Hereby Offers to Prove the following facts, by and through the testimony of the witnesses herein indicated, and hereby represents to the Court that if said witnesses had been called and allowed to testify, their testimony would have been substantially as herein set forth (the same being substantially the form of statements of such witnesses taken in the course of preparation for trial of said matter): [80]

TESTIMONY OF TOM BORDEN

Q. Please state your name and address.

A. Thomas C. Borden, 1090 East Second Street, Norco, California.

Q. What is your occupation?

A. Traffic Manager for Exchange Lemon Products Company.

Q. What do your duties consist of as Traffic Manager of Exchange Lemon Products Company?

A. Routing and shipping of all products from

(Testimony of Tom Borden.)

our plants at Corona and Covina, obtaining the facilities of warehouses at points distant from Corona, handling all rate cases or rate application with the carriers and other factors incidental to those.

Q. Are you the only person in your department or are there others?

A. At the present time there are 12 others in my department.

Q. When did you first become the Traffic Manager of Exchange Lemon Products Company?

A. In January 1, 1941.

Q. And what did you do prior to that time?

A. Prior to 1941 I was in various types of business. I was in the warehouse business in Sterling, Colorado, for seven years.

Q. Calling your attention to a document marked Exhibit A, and attached to the pretrial order in this action, which is an insurance policy of The Home Insurance Company issued to insure the Exchange Lemon Products Company, I'll ask you, Mr. Borden, if you recognize this policy?

A. I do.

Q. Did you have anything to do with negotiation or preparation? A. Yes.

Q. Did you know Mr. James S. Jennings?

A. Yes, I did.

Q. To your recollection, when did you first meet Mr. Jennings? [81]

A. I met Mr. Jennings in Mr. Hall's office probably——

(Testimony of Tom Borden.)

Q. Who is Mr. Hall?

A. The former General Manager of Exchange Lemon Products Company.

Q. Please continue.

A. Mr. Hall introduced Mr. Jennings to me possibly three or four years prior to the time that this policy was issued.

Q. Did you have any dealings with Mr. Jennings at that time? A. Not particularly.

Q. Do you recall when this particular policy was discussed, if it was discussed, between yourself and Mr. Jennings? A. Yes.

Q. When was that?

A. As I recall it was the latter part of January or the first of February in 1946.

Q. How were negotiations for the policy (Exhibit A) commenced, if you know?

A. Mr. Jennings contacted Mr. Hall first.

Q. When did you first hear of the policy or of the proposed policy?

A. The latter part of January or the first of February, 1946.

Q. When was the first time you talked to Mr. Jennings about it? A. At that time.

Q. And where did the first meeting take place at which you talked to Mr. Jennings about the policy? A. In my office.

Q. Who was present at that meeting?

A. Mr. Jennings and myself.

Q. Was Mr. Hall present?

A. No, Mr. Hall was not present.

(Testimony of Tom Borden.)

Q. Was anyone else present other than yourself and Mr. Jennings at this conversation?

A. No. [82]

Q. Can you state in substance what was said by Mr. Jennings and what was said by you at this first conversation?

A. Mr. Jennings mentioned that he had discussed with Mr. Hall a transportation policy which would cover all of our needs and Mr. Hall had told him that the proper person to discuss it with was me and that after we had arrived at some conclusion that he would take it up again—that he would take it up again with Mr. Jennings. Mr. Jennings explained the situation to me about the different forms of transportation policies and that he had a special form——

Q. May I interrupt you now? Don't say that he explained the different types of policies. That's a conclusion of yours as to what the substance of what he said was rather than saying what he said. Did he talk to you about a particular type of policy, and, if so, what?

A. He mentioned a policy that would cover all phases of our transportation.

Q. What else was said by Mr. Jennings at that time?

A. That this type of policy which he proposed would cover our products from the time they were loaded in the railroad car until they were delivered either to the customer or to a destination warehouse.

(Testimony of Tom Borden.)

Q. What do you mean by destination warehouse?

A. Destination warehouse is one from which merchandise is delivered directly to the consumer or the retail merchants or to large industries.

Q. Is there any other type of warehouse? In other words you use the term, "destination warehouse." Does that mean a warehouse different from any other warehouse?

A. Yes. There are transit warehouses.

Q. What do you mean by transit warehouses?

A. Transit warehouses are strategically located in various parts [83] of the country where merchandise can be moved from one point, stopped in transit while still in the due course of transportation, and stored until at a future date when the demand or market is ample to take care of the product.

Q. Well, actually, Mr. Borden, these transit warehouses are storage warehouses. What is the difference between those and what you call destination warehouses? Aren't they actually the same?

A. Physically, yes, but actually a very complete system of records is kept of all merchandise that are placed in transit warehouses so that at a future date when the shipper desires to forward his merchandise on to its ultimate destination he can do so without being penalized with an arbitrary rate.

Q. What do you mean by being penalized with an arbitrary rate?

A. The difference between the through rate from the point of origin to point of final destination and

(Testimony of Tom Borden.)

the rate from point of origin to the transit point and then the rate from the transit point on to destination.

Q. Did Mr. Jennings make any reference to these transit warehouses at the time of your first conversation with him? A. Yes.

Q. What did he say regarding transit warehouses?

A. He said that up to that time although we had not used the storage in transit that in the future our business might be such so that we would require storage in transit.

Q. Did he say anything regarding whether or not the policy which he proposed would cover goods while stored in transit? A. He did.

Q. What did he state in that regard?

A. He said that, as we were growing, it would be necessary for us to have a policy that we would be amply covered and secure in knowing that our merchandise was well taken care of, [84] regardless of where stored.

Q. And did he say that this transportation policy would cover that risk? A. He did.

Q. Was there anything else stated at your first meeting with Mr. Jennings?

A. Not that I can recall.

Q. Did you have any subsequent conversations with Mr. Jennings regarding this policy?

A. Yes.

Q. When was the next conversation that you had with him? A. Possibly two weeks later.

(Testimony of Tom Borden.)

Q. Where was that?

A. That was on the telephone.

Q. And you were where?

A. I was in Corona.

Q. And he was where?

A. At his office in Glendale.

Q. What was said on that occasion by you and what was said by him, in substance?

A. Mr. Jennings said that he had the articles drawn up that he thought should be incorporated in the policy and that he read them to me over the telephone.

Q. Were those the same provisions that are contained in the typewritten portion of the policy?

A. Substantially, yes.

Q. And what did you say?

A. I told him that I would like to see them before they were added to the policy.

Q. Were they sent to you?

A. Mr. Jennings brought them out on one of his trips a short time later. [85]

Q. Did you talk to him at that time?

A. I did.

Q. What did he say then?

A. He said that he was not sure whether The Home Insurance Company would accept these provisions as a rider to the policy but that he would do his best to get them to do so.

Q. Did he give you a copy of the rider at that time or proposed rider? A. No.

Q. Did you look at it at that time?

(Testimony of Tom Borden.)

A. I did, and he explained it to me.

Q. Did he say anything at that time with regard to storage in transit?

A. No more than he had previously.

Q. Did he repeat what he had previously said?

A. Yes.

Q. And that was what?

A. That this would cover our merchandise from the time it was loaded in Corona until it was delivered at final destination.

Q. And he used that term final destination?

A. That's right.

Q. Did he make any specific reference to the fact that it would include in transit storage? Or are you implying it simply from his use of the term final destination?

A. No. Mr. Jennings used the words storage in transit.

Q. And what did he say in that regard?

A. That this policy covered all merchandise from the time it left our shipping point at Corona, stored in transit and until delivered at final destination.

Q. Mr. Borden, did you notice the provision in the typewritten portion of the policy which states, "This policy covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, [86] stations and/or on platforms, but only in due course of transit and not if such property is in storage"?

A. That's right.

Q. Did you ask Mr. Jennings about that latter part, "not while such property is in storage"?

(Testimony of Tom Borden.)

A. I did not.

Q. Did he comment with regard to this particular provision, in other words, did he point out that provision and say anything?

A. Not that I remember.

Q. Was any particular comment made with regard to the use of the term warehouses in the provision that the goods were covered while in, among other things, warehouses? That is at the time you looked at the rider did he point to it or did you point to it and have anything to say in regard to it?

A. He said that that covered all phases of our transportation or that would cover all phases of our transportation.

Q. That's looking at the word warehouses or looking at the whole rider?

A. At the whole rider.

Q. Did you have any further conversation with Mr. Jennings regarding this policy?

A. Only on the telephone.

Q. Do you remember those conversations?

A. He called me possibly the middle of April and told me that he had not received the policy back from The Home Insurance and that he was a little dubious if the company would accept the rider.

Q. Did he comment with regard to any particular portion of the rider? A. No.

Q. Did he state what he was worried about the company not [87] accepting?

A. He said that the reason he was doubtful was

(Testimony of Tom Borden.)

that the policy was all-inclusive and they might figure it was a one-way deal.

Q. Did you have occasion to talk to him at any subsequent time? A. Yes.

Q. When was that?

A. A short time later he called me and told me the policy had been returned and that he would bring it out to Corona.

Q. Did he bring it out to Corona?

A. He did.

Q. And is this the policy he brought out?

A. That's right.

Q. Now, is the transportation rider, as it appears on this typewritten portion of this policy, identical to the form which Mr. Jennings originally showed you? A. Yes.

Q. You say it is identical. Do you have a copy of the original form he submitted to you?

A. Only the one that is in this policy.

Q. When he came out and had a rider he was going to send back to the company, do you know the company accepted that rider or did the company make changes in the rider?

A. I cannot answer that.

Q. Did Mr. Jennings indicate that this was the same rider which—— A. He did.

Q. He said they have accepted the rider which he prepared? A. Identically.

Q. He expressly represented that to you?

A. That is correct.

Q. As far as you know, is there any difference

(Testimony of Tom Borden.)

between the rider which appears on this policy and the one which he showed you? [88]

A. There is not.

Q. Did you review this rider when the policy was received? A. I did.

Q. Was anything further stated at that time with regard to the question of whether the policy insured goods while stored in transit?

A. No.

Q. Mr. Borden, are there other persons situated similarily to yourself, that is, traffic managers, with other companies?

A. Yes; all large shippers have traffic managers or persons performing such duties.

Q. Are there any associations or trade organizations of traffic or transportation personnel?

A. Yes. Traffic clubs, transportation clubs.

Q. Are those on a local or national level?

A. They are on both. Local clubs are generally affiliated with the Associated Traffic Clubs of America.

Q. Are there any trade publications of the transportation trade?

A. Yes; the chief of which is the Traffic World.

Q. Is that a national publication?

A. It is.

Q. What does it contain?

A. It contains court decisions, decisions of the Interstate Commerce Commission, and pertinent facts and information relative to different modes

(Testimony of Tom Borden.)

and types of transportation which is of interest to the traffic man only.

Q. During the period from 1941 to the present, was Exchange Lemon Products Company engaged in the transportation trade? A. Yes.

Q. Would you amplify that answer?

A. By way of illustration, in 1953 we shipped approximately 950 cars of products in interstate commerce by rail carriers; [89] in 1946, 125 cars.

Q. Mr. Borden, is there any peculiar trade usage or meaning in the transportation trade of which you are aware for the term "transit" or "in transit"? A. Yes.

Q. Would you state what that meaning is?

A. The term is used generally to apply to goods shipped or held pursuant to transit provision of the railroad freight tariffs which are lawfully on file with the Interstate Commerce Commission. Thus, goods are referred to in the trade as being in transit until they reach their final destination, from point of origin to final destination.

Q. Now, Mr. Borden, with respect to the loss upon which the claim of Exchange Lemon Products Company in this litigation is based, are you familiar with the proof of loss which was filed with the insurance company and which is attached as Exhibit A to the Answer to the Complaint? A. I am.

Q. Mr. Borden, I note that of the one hundred sixty-odd thousand dollars worth of product for which the claim is made in excess of $128,000.00 was in fifty-gallon barrels. It is referred to as No.

(Testimony of Tom Borden.)

323, Calamona concentrated lemon juice. Could you explain what that product is and the circumstances under which it was held at Crooks Terminal Warehouse?

A. Our product, No. 323, is preserved with sulphur dioxide and is a concentrated lemon juice which was produced for one customer only, located in Chicago, Illinois. This product had to be produced at the time we had sufficient supplies of raw material to insure this customer of an ample supply the following season. When this product was produced in 1950, we had an ample supply of lemons come in the latter part of the summer and early fall, so we were able to produce a [90] substantial amount of his requirements several months prior to the time it was needed. Due to lack of storage facilities near our plant or at our plant, it was much more economical to store in transit at Crooks Terminal Warehouse at Kansas City to be forwarded on at a later date and as ordered by this customer.

Q. Were there no firm shipping instructions or orders on this product at the time of its destruction?

A. No. There were no orders for this merchandise at the time, although there was a definite understanding between the two companies relative to the minimum amount of concentrated juice that would be required during the following season, and that we were to supply the necessary concentrate.

(Testimony of Tom Borden.)

Q. Were these barrels marked in any particular manner so as to designate them to the one customer?

A. These barrels had their heads painted white and stenciled Puritan Company of America, Chicago, Illinois.

Q. Puritan Company of America is the one customer you referred to? A. That is correct.

Q. Now the balance of this claim is a product, No. 319, being 5,942 cases. What is that product?

A. That is a concentrate for lemonade packed in small tins for the consumer trade.

Q. This product then could just as well been sold in Kansas City as any place else?

A. Yes; some of it was sold in Kansas City.

Q. Do you mean some of the products out of Crooks Terminal Warehouse was sold in Kansas City? A. That is right.

Q. Doesn't that mean that that product had reached terminal storage in Kansas City? [91]

A. No; not that portion.

Q. Would you explain your answer?

A. When products are shipped to a transit point, a record is kept by the carriers or an agency designated by them for keeping records of all transit merchandise entering that locality. It is permissible to release any portion of any transit tonnage by advising the carrier of the amount to be released but any amount that is released cannot be reinstated into transit tonnage again. When this tonnage is released in a warehouse, it is immediately placed

(Testimony of Tom Borden.)

with distribution stocks separate from the tonnage remaining for transit purposes only.

Q. In other words, the transit tonnage is physically segregated? A. That is right.

Q. Who is the agent of the carriers for purposes of registering transit stocks in Kansas City?

A. Western Weighing and Inspection Bureau.

Q. And were all of the stocks covered by your claim at the time of their destruction registered with Western Weighing and Inspection Bureau as transit goods?

A. All the stocks that are in this claim were registered with the Western Weighing and Inspection Bureau as being in transit at that time.

Q. Did you, in fact, suffer loss to any similar products in Kansas City at that time, which loss was not included in this claim? A. Yes.

Q. And why were those stocks not covered by this claim?

A. Because they were distribution stocks and were not in transit.

Q. When you say they were not in transit, you use the word in what sense?

A. That they were not still in the due course of transportation as interpreted by the trade. [92]

TESTIMONY OF C. S. CONNELLY

Q. Will you state your name and residence address?

A. C. S. Connelly. I reside at 3470 Berry Drive, North Hollywood.

Q. And your occupation, Mr. Connelly?

A. General Traffic Manager for the Carnation Company.

Q. That is in Los Angeles, is it?

A. Yes, sir; in Los Angeles. My office is in the Carnation Building at 5045 Wilshire Blvd.

Q. How long have you held that position, Mr. Connelly?

A. I have held my present position for the past fifteen years and prior to that time I was Western Traffic Manager for the Carnation Company in Seattle, Washington, and prior to that I was General Traffic Manager of Albers Milling Company and held that position at the time Carnation Company purchased the Albers Milling Company.

Q. Do you have any experience in the transportation trade prior to the time that you went with the Albers Milling Company?

A. Prior to the time I was employed by the Albers Milling Company I was with the United States Railroad Administration.

Q. During what period of years was that?

A. I left the Railroad Administration in May, 1923, to take employment with the Albers Milling Company on June 1, 1923.

Q. Would you state generally the nature of your duties at Carnation Company?

(Testimony of C. S. Connelly.)

A. I have full supervision of all matters pertaining to transportation. That includes raw materials brought into the plants, the outbound products, warehousing of the outbound products. In fact, everything that pertains to our transportation comes under my supervision.

Q. Is your type of business such that there is an association or grouping of transportation men, that is, is it an occupation or trade which has men in similar positions in other companies? [93]

A. Yes.

Q. And do you have associations of traffic men in the United States?

A. We have the national organization known as the National Industrial Traffic League and the membership of that league is composed of men who occupy positions similar to mine in other companies throughout the United States.

Q. Are there any publications put out particularly for or by traffic men?

A. Well, the league puts out a weekly bulletin showing important happenings in the transportation field during that week and they also put out another publication called the Legislator which deals with changes in legislation affecting transportation. The Traffic World is a national publication devoted to transportation and is largely read by the traffic men throughout the country.

Q. Mr. Connelly, among traffic men engaged in the trade, is there any generally accepted usage of

(Testimony of C. S. Connelly.)

which you are aware for the term "transit" or "in transit"?

A. Yes; we generally use and interpret the word "transit" as meaning goods shipped subject to the transit privilege.

Q. Would you explain briefly what you refer to by "transit privilege"?

A. Yes. I will take grain, for example, and transport the grain to a storage or milling point and under the railway tariffs the shipper is privileged to unload the grain and record the inbound freight bill covering that grain for what is known as a transit privilege. Under the transit privilege, the shipper or owner of the grain can mill the grain or clean it or something of such sort and then reship it to another destination and, under the tariff governing the transit privilege, the shipper is accorded the through rate from the [94] origin of the grain to the final or ultimate destination. The tariffs sometimes make a charge for the privilege and sometimes no charge is made, depending on the circumstances.

Q. Is the transit privilege restricted to stoppage for processing or reprocessing of the goods?

A. No. Transit privileges cover a wide number of uses at the stoppage point. I would say the fabrication of iron and steel articles, or storage of canned goods, are among other normal transit uses. The transit privileges cover a host of different operations at the transit point. The particular transit

(Testimony of C. S. Connelly.)

privilege is dependent upon the provisions of the specific applicable tariff.

Q. To your knowledge, Mr. Connelly, is this trade usage of the term "transit" of general and widespread notoriety among traffic men?

A. Yes.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work.

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked, "Registered for Storage in Transit." These goods [95] are unloaded in Kansas City, are registered with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have

(Testimony of C. S. Connelly.)

been received, there being a two-year limit on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are "in due course of transit." As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are "in due course of transit"?

A. I would say that the goods are "in transit" since the goods were properly registered under the tariffs for the transit privilege. [96]

TESTIMONY OF HAROLD S. SCOTT

Q. Please state your name and residence?

A. Harold S. Scott, 627 Comstock Avenue, Whittier, California.

Q. And your occupation, Mr. Scott?

A. Western Traffic Manager for the Quaker Oats Company.

Q. Will you describe briefly the nature of your duties as Western Traffic Manager for the Quaker Oats Company?

A. My duties are supervision of traffic of the Quaker Oats Company, principally transit operators. That includes all Quakers Oats Products, flour milling, feed mixing, also I have some dealings with Coast Fisheries, a subsidiary of our company, who is shipping canned goods.

Q. How long have you been in the transportation business?

A. Since 1919, that's 34 years.

(Testimony of Harold S. Scott.)

Q. Have you been with the Quaker Oats Company all of that time? A. Yes, sir.

Q. And how long have you been the Western Traffic Manager?

A. I was appointed to that position February 1, 1954. Prior to that time I had similar duties in the General Office of the Quaker Oats Company in Chicago. I was their top rate man in the Chicago Office which supervised transit all over the country.

Q. Mr. Scott, in the course of your work in the transportation business, have you had occasion to familiarize yourself with railway rate tariffs and operations thereunder?

A. Since being with the Quaker Oats Company, that's been one of my principal duties. I started out learning tariffs and before long was specializing in one territory and afterwards was given more or less general supervision over traffic in all sections of the country. I've appeared before Rate Committees in regard to rate dockets and am very familiar with all transit practices. [97]

Q. Are you familiar with the so-called transit privilege provisions of the railway freight tariffs?

A. Yes, I'm familiar with the transit tariffs in all sections of the country, including Canada.

Q. Do they follow a general pattern similar throughout the various applicable tariffs?

A. They do follow a general pattern. Usually we have followed the practice of trying to handle them more or less uniform throughout the country.

(Testimony of Harold S. Scott.)

Q. Would you describe briefly what the operation of the transit privilege provisions of the railway freight tariff are?

A. Well, under "transit" provisions in the tariffs, products are moved into a mill, warehouse, storage point or other manufacturing point and are unloaded into such places and the freight bills are recorded and kept on record by the transportation companies until such goods are moved out to their final destination.

Q. What is the purpose of establishing this transit provision?

A. The principal purpose of transit is to maintain competitive conditions in all milling sections. For example, the man at the terminal point would have an advantage over a man at an interior point without transit.

Q. Now, from an historical standpoint, do you know whether transit was originally for storage or for stoppage to process goods?

A. From my recollection, the original transit was for taking raw products and converting them into products. The question of storage in transit has been more or less opposed by the carriers on occasion and they have tried to distinguish between storage and milling, but now, generally throughout the country all such transit involves storage, converting into products or otherwise shipping into and out of a transit point. [98]

Q. And by "storage in transit," you refer to what type of an operation?

A. Storage in transit means a shipment of a

(Testimony of Harold S. Scott.)

commodity or material into a point and reshipping the same material without otherwise treating it at the transit point.

Q. Now you refer in your answer to the word transit to describe this practice of shipping, unloading, processing or holding and then reshipping goods. Is this an abbreviation of your choosing or is it a generally accepted and understood usage of the word among transportation men?

A. It is general usage among traffic men.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work,

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked "Registered for Storage in Transit." These goods are unloaded in Kansas City, are registered

(Testimony of Harold S. Scott.)

with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have been received, there being a two-year limit [99] on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are "in due course of transit." As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are "in due course of transit"?

A. I would consider those goods "in transit" as long as the bills remain recorded with the transportation company and the shipper had shown his intention to ship them to a destination.

Q. Does your answer apply equally to the general consumer goods as to those normally produced for Y Company? A. Yes. [100]

TESTIMONY OF JAMES S. JENNINGS

(Excerpts from deposition taken at Glendale, California, March 24, 1954, at the request of counsel for Plaintiff, The Home Insurance Company.)

JAMES S. JENNINGS

having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Menzies:

Q. Will you please state your name, Mr. Jennings? A. James S. Jennings.

Q. What is your business or occupation, Mr. Jennings?

A. I am retired through disability.

Q. At one time were you an agent with the Home Insurance Company in New York?

A. I was.

Q. At any time did you write a policy for the Exchange Lemon Company, a corporation?

A. It is the Exchange Lemon Products.

Q. Products, that's right, sir.

A. I wrote many policies for them.

Q. Well, did you ever write or cause to be written a transportation policy No. 338460?

A. I wouldn't be sure of the number. I wrote a transportation policy for them.

Q. I show you here the original policy that Mr.

(Testimony of James S. Jennings.)

Stark has been kind enough to hand me and ask you whether or not that is——

Mr. Stark: That is the same policy, Mr. Menzies, a photostatic copy of which is attached to the pre-trial order as Exhibit A,

Mr. Menzies: Thank you.

The Witness: Yes, I remember this policy. I wrote the policy as an agent for the Home.

Q. I take it you had considerable experience in the traffic [101] problems?

A. I believe I was a traffic expert.

Q. Now, Mr. Jennings, how much experience have you had in the transportation field?

A. Take a long time. I started in 1916 at the time the Jennings-Cornwall Warehouse Company was built. It was then the Jennings-Hanna Warehouse Company, and under an uncle, James E. Jennings, I was trained in the warehouse business. I was going to school at the time but he used to have me at his house a great deal of the time at night and we would go over the correspondence, all of the reports and all of the operations, and I would go down there occasionally week ends, on Saturdays. Then after the First World War, I finally went to work there. I don't remember whether it was 1920—I guess it was —and I went through every department from the unloading, the loading, the warehouse goods, the trucking, the office, the records, the traffic, up to the superintendant, and then assistant manager. Then I came to Los Angeles in 1923 and I started the Jennings-Nibley Warehouse Company. My partner,

(Testimony of James S. Jennings.)

Nathan Nibley, had no experience whatever in that business. I managed that business till 1927, and in the fall of '27 I organized with The Citizens Truck Company, The Associated Shippers, consolidating freight from the East coast by water out here, and in 1928 and part of '29 I managed the office for the Western Traffic Conference, the Cotton Piecegoods Association, and also fully managed the Associated Shippers, which was by then owned by three trucking companies, The Pioneer, The California, and the Citizens Truck Company. I also operated a claims service personally, for those of our customers that I could get to use it and for which I charged a fee. Subsequently, in the insurance business, I discussed —I was called upon to [102] explain the liability of carriers at several meetings of men, including The Traffic Association of Los Angeles County, at which I made a speech one evening covering that point, the liability of carriers.

Q. Now, do you know whether or not there is any special meaning in the trade usage of the words "Storage in transit"?

A. Yes, I am very familiar with storage in transit. Our warehouse company in Salt Lake, along about '21 or '22, was able to secure a storage in transit privilege on sugar, and I personally supervised the handling—I would like to strike that from the record. I don't remember the date, but that was storage in handling. I personally was instrumental in working with a Mr. J. H. Cornwall in getting that rate established.

(Testimony of James S. Jennings.)

Q. Well, tell me what it means?

A. Storage in transit is a privilege given to a shipper, that he may move his merchandise out of the original point of shipment, stop it at a warehouse or plant, wherever he chooses, and then when and if he is ready to forward it on for an additional charge, he is able to move it at the through rate from the original point of shipment to the final destination, the theory being that the additional charge is considerably smaller than the charge would be for the two shipments. I don't remember exactly what we did get there on sugar. However, since that time I have explained it to many of our customers, and it is a standard practice.

Q. Well, then, as I gather it from your testimony here, that particular phraseology, as it applies to transportation, merely gives to the shipper the benefit of a rate differential?

A. Well, I can't answer that with a yes or no, because it gives to the shipper a chance to store in places that are cheaper, probably, than the destination. It gives him a chance to store [103] at a center where they can distribute to many places, and at the same time only pay this small differential for that privilege. They don't have to ship beyond at all. They can distribute right from wherever it is, or use it there, but it gives them that privilege.

Q. In other words, the meaning of the word, as I gather it, or the phrase, is a privilege to hold the goods and either ship or store?

(Testimony of James S. Jennings.)

A. I don't understand that hold the goods to ship or store.

Q. Well, they have the option there of shipping to a central location?

A. To any location that the railroad has granted a storage in transit privilege.

Q. That, I understand, is taken care of through some ICC regulations?

A. I imagine they are filed with the ICC and approved by them.

Q. Now, was that particular meaning of the phrase discussed with Mr. Jennings, Miss Tuthill—— A. You mean Mr. Hall?

Q. Mr. Hall, Miss Tuthill or Mr. Bordon?

A. Yes. Whether I was instrumental in explaining that to Mr. Hall originally for their shipments, I don't know. We discussed that many times. As far as discussing it with Miss Tuthill, I do not remember discussing it with Miss Tuthill.

Q. Did you discuss this particular policy and its phraseology with Mr. Bordon? A. I did.

Q. What discussion did you have with him and what was said?

A. I remember being sent in to see him by Mr. Hall. I do not remember whether it was before or after this policy was written, but I had the form in my hand at the time, and I went over it with him. I also remember discussing storage [104] in transit with Mr. Bordon. For what purpose, I don't remember, but I remember going over it very carefully, storage in transit, with Mr. Bordon. Now, the

(Testimony of James S. Jennings.)

reason I remember, I was somewhat surprised at the questions he asked me concerning it.

Q. What questions did he ask you?

A. It is so long ago I can't remember his exact words, but they were primarily as to the usage of storage in transit.

Q. When you say the usage of it, what do you mean by that, sir?

A. Well, lots of people don't know about it and don't know what—how to get it, how to use it.

Q. How do you get it?

A. You go to a railroad and find out whether they are willing to grant it, if it hasn't already been granted. Then with their co-operation, they make the applications to file their rates as such, and they grant it, but if it isn't granted, you have to arrange through the railroad company to get it.

Cross-Examination

By Mr. Stark:

A. I don't remember discussing this policy with Mr. Bordon until we had the form written, because when I went in there, I had it. Whether it was on a policy or whether it was on my form, I don't remember.

Q. Now, you say on your form?

A. I typed up this form that has been typed on that policy by the Home. In other words, that form was worked over two or three times before it went to the Home for their approval. [105]

The foregoing offer of proof is hereby respectfully submitted as a part of the District Court record in this matter.

Dated October 11, 1954.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Defendant, Exchange Lemon Products Company, Donald D. Stark.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 12, 1954. [106]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

On April 23, 1946, plaintiff, The Home Insurance Company, issued to the defendant, Exchange Lemon Products Company, a transportation insurance policy whereby, subject to the terms and conditions of the policy, plaintiff insured defendant against loss or damage to its products. On various dates between May 3, 1950, and August 22, 1950, defendant shipped certain citrus by-products from Corona, California, consigned to the defendant for "storage in transit" at Crooks Terminal Warehouse, Kansas City, Missouri. For a period of approximately one year these products were maintained in said warehouse for the account of defendant and were still awaiting further shipping orders when, on July 13,

1951, and while the policy was in full force and effect, they were totally destroyed by a flood. Defendant filed a timely proof of loss with the plaintiff and demanded $161,991.63 as the value of the products destroyed. Plaintiff refused payment and now seeks from this court a declaration of rights, duties and liabilities of the parties [108] under the policy. Defendant has filed a counter-claim and prays for a judgment in the amount of its claimed loss with interest and costs.

It is plaintiff's contention that at the time of their destruction, defendant's products were not insured under the policy. The basis for this contention is the provision of the policy reading: "This policy covers * * * the insured property * * * only while in due course of transit and not if such property is in storage."

At the pretrial hearing the parties stipulated to the facts and agreed that there were no issues of fact for trial unless "* * * the court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term 'in due course of transit.' "

When the case was called for trial the plaintiff objected to defendant's proffered evidence of trade usage in the transportation trade, and the court sustained the objection. Thus, there were no issues

of fact for trial, and in accordance with the pretrial agreement of the parties no jury was impaneled.

The primary question of law is the interpretation of the contract of insurance. This is a diversity case and California law is applicable. Erie R. Co. v. Tompkins, 304 U. S. 64. The parties concede that the products were in storage at the time of their destruction and the policy specifically provides that it does not cover when the property is in storage. To avoid the effect of this specific provision of the contract, defendant seeks to introduce [109] evidence of trade usage in a trade in which neither of the parties is engaged, for the purpose of establishing that by the use of the term, "in due course of transit," the parties intended that the policy should cover when the property was in a certain kind of storage, even though the contract expressly provides that it shall not cover if such property is in storage.

The law is clear that evidence of trade usage may be admitted to define a word or term used in a contract. Myers v. Tibbals, 72 Cal. 278, 13 p. 695; Higgins v. California Petroleum & Asphalt Co., 120 Cal. 629, 52 p. 1080; Cal. Code Civ. Proc., Secs. 1861 and 1870 (12); Cal. Civ. Code, Sec. 1644. And there is no requirement that the word or term sought to be defined be obscure or ambiguous. Ermolieff v. R. K. O. Radio Pictures, Inc., 19 Cal. 2d 543, 122 p. 2d 3, 6; Body-Steffner Co. v. Flotill Products, 63 Cal. App. 2d 555, 147 p. 2d 84; 55 Am. Jur. Sec. 37, page 299; 89 A. L. R. 1228.

Trade usage in a particular trade is admissible where both parties are engaged in that trade. In such a case the parties to the contract are deemed to have used the disputed term according to the meaning or sense it bears in the trade. As stated in Restatement of Contracts, Section 248, page 532: "Where both parties to a transaction are engaged in the same occupation, or belong to the same group of persons, the usages of that occupation or group are operative, unless one of the parties knows or has reason to know that the other party has an inconsistent intention." That the instant action is not such a case is clear, for plaintiff is engaged in the insurance business and defendant in the business of marketing citrus products. [110]

The question of admissibility of evidence of trade usage may arise where one of the parties is engaged in the trade whose usage is sought to be admitted and the other is not. The rule in such a case was thus stated in Latta v. DaRoza, 100 Cal. App. 606, 280 p. 711; "To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence." Lynch v. Bekins Van & Storage Co., 31 Cal. App. 68, 159 p. 822, and Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2464, p. 209, are in accord. In the instant case, defendant alleged a usage for the term, "in due course of transit," in the transportation

trade, and plaintiff's knowledge thereof. As already noted, neither of the parties is engaged in that trade. However, defendant erroneously contends that, as a shipper it is engaged in the transportation trade. The mere fact that one arranges for the transportation of property does not mean that such person is engaged in the transportation trade any more than everyone who has a bank account could be deemed to be engaged in the banking trade within the meaning of the rule.

In its counter-claim, the defendant alleges, "The term 'in due course of transit' has a trade usage in the transportation trade, to wit: shipped in compliance with the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, which includes what is known as 'transit storage' or 'stoppage in transit' as distinguished from local or terminal storage." Defendant also avers that the goods destroyed on July 13, 1951, were stored under the transit privilege provisions of said railway [111] tariffs. Further, it is alleged that the policy was negotiated between James S. Jennings, plaintiff's agent, and Thomas C. Borden, defendant's traffic manager, and that both persons knew of the trade meaning of the term, "due course of transit," and discussed the same in connection with negotiations for the policy.

Assuming the truth of these allegations, they establish another fundamental reason why evidence of trade usage is not admissible in this case. The defendant alleges that the goods were placed in

storage under the transit privilege provisions of the railway tariffs authorized by the Interstate Commerce Commission, and that the privilege provisions included the right to storage in transit.[1] The railway tariffs and the transit privilege provisions authorizing storage in transit relate to the published schedule of rates and charges and are a part of the contract between the freight carrier and the shipper, but have nothing to do with contracts of insurance between the shipper and an insurer. The privileges referred to permit the shipper to remove stocks from the channels of transportation, maintain such stocks in storage for a period and thereafter return them to the channels of transportation without losing the benefit of long-haul rates. If, as alleged in the counter-claim , the agents of the parties knew of and discussed the transit privilege provisions of the applicable railway tariff and the likelihood of storage occurring, the insertion [112] in the contract of the express provision that the policy does not cover "if such property is in storage" is a clear indication that the parties intended to exclude the application of such usage from their contract. Under such circumstances the law is settled that evidence of trade usage is not admissible. The California Supreme Court in Ermolieff v. R. K. O. Radio Pictures, Inc.,

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[1]The applicable railway freight tariff was stipulated to and attached to the pretrial order. Storage in transit is included in the privilege provisions of this particular tariff. It is also noted that the bills of lading which are attached to the pretrial order are marked "Register for storage in transit."

supra, citing New York Central R. Co. v. Frank H. Buck Co., 2 Cal. 2d 384, 41 p. 2d 547, states the rule: "* * * where the terms of the contract are expressly and directly contrary to the precise subject matter embraced in the custom or usage, parol evidence of that custom or usage is not admissible." Also see Fish v. Correll, 4 Cal. App. 521, 88 p. 489; Withers v. Moore, 140 Cal. 591, 74 p. 159; Wigmore on Evidence, 3rd ed., Vol. IX, Sec. 2440, p. 127; Williston on Contracts, Sec. 656; Restatement, Contracts, Sec. 247, comment (d), p. 350.

As stated by the United States Supreme Court, "This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom." Grace vs. American Central Ins. Co., 109 U. S. 278, 283.

The language of the contract is unambiguous and is fairly susceptible of but one interpretation. It is denominated a transportation policy and the parties intended it to cover the goods while being transported, "but not if such property is in storage." At the time of their destruction and for approximately a year prior thereto, the goods were in storage and, therefore, not covered by the policy. [113]

The findings of fact and conclusions of law appearing in this memorandum of decision shall serve as findings and conclusions pursuant to Rule 52(a)

F. R. C. P. Counsel for plaintiff is requested to prepare, serve and lodge a formal judgment for settlement in accordance with local Rule 7.

Dated at Los Angeles, California, this 15th day of December, 1954.

/s/ WILLIAM M. BYRNE,
United States District Judge.

[Endorsed]: Filed December 15, 1954. [114]

United States District Court, Southern District of California, Central Division

No. 13878-WB

THE HOME INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,

Defendant.

DECLARATORY JUDGMENT

The above-entitled cause came on regularly for trial October 5, 1954, before the Honorable William M. Byrne, Judge of the United States District Court, Southern District of California, Central Division, sitting without a jury; Thomas P. Menzies, Esq., appearing as counsel for the plaintiff, and Messrs. Donald D. Stark and E. Spurgeon Roth-

rock of the firm of Clayson, Stark and Rothrock, appearing as counsel for the defendant, Exchange Lemon Products Company, a corporation; and the parties having previously stipulated and agreed in the pretrial proceedings that there were no issues of fact for trial unless the court ruled as a matter of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term, "in due course of transit"; and the defendant having made an offer of proof with respect to said trade usage; and the court having ruled that evidence of said trade usage was not admissible; and the cause having been submitted to the court for decision; and the court having filed its memorandum of decision which included findings of fact and conclusions of law on the issues herein; and the court having directed that [115] its findings of fact and conclusions of law appearing in its memorandum of decision serve as findings of fact and conclusions of law pursuant to Rule 52 (a), F. R. C. P.;

Now, Therefore, in accordance with its findings of fact and conclusions of law,

It is Ordered, Adjudged and Decreed as and for the declaratory judgment of this court is as follows:

(1) That the loss from destruction by flood of the defendant, Exchange Lemon Products Com-

pany's products, while maintained in Crooks Terminal Warehouse in Kansas City, Missouri, is not covered by the policy of insurance issued by the plaintiff, The Home Insurance Company, a corporation, on April 23, 1946, and the plaintiff, The Home Insurance Company, is not obligated to bear or pay any part of the expense of the loss of said goods.

(2) That the defendant, Exchange Lemon Products Company, a corporation, take nothing by reason of its counter-claim on file herein.

(3) That the plaintiff, The Home Insurance Company, a corporation, is entitled to judgment against the defendant, Exchange Lemon Products Company, a corporation, for its costs incurred herein to be hereafter taxed in accordance with the rules of this court. Costs taxed at $114.95.

Done in Open Court this 30th day of December, 1954.

/s/ WILLIAM M. BYRNE,
United States District Judge.

[Endorsed]: Filed December 30, 1954.

Docketed and entered December 30, 1954. [116]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Exchange Lemon Products Company, defendant in the above-named action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 30, 1954.

Dated December 31, 1954.

CLAYSON, STARK & ROTHROCK,

By /s/ DONALD D. STARK,

Attorneys for Defendant Exchange Lemon Products Company.

Affidavit of Mail attached.

[Endorsed]: Filed January 4, 1955. [117]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. The court erred in refusing to impanel a jury or to allow introduction of any evidence;

2. The court erred in refusing to allow introduction of evidence on the issue of trade usage;

3. The court erred in refusing to allow introduction of evidence on the issue of ambiguity of the insurance contract.

Dated January 4, 1955.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Defendant-Appellant Exchange Lemon Products Company.

Receipt of copy acknowledged.

[Endorsed]: Filed January 13, 1955. [118]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 120, inclusive, contain originals of Complaint; Answer to Complaint, Counter-claim and Demand for Jury Trial; Amended Answer; Amended Counter-claim; Answer to Amended Counter-claim; Pre-trial Order; Offer of Proof; Memorandum of Decision; Declaratory Judgment; Notice of Appeal; Appellant's Statement of Points; and Designation of Contents of Record on Appeal, which constitute the transcript of record on appeal

to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of February, 1955.

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14657. United States Court of Appeals for the Ninth Circuit. Exchange Lemon Products Company, a Corporation, Appellant, vs. The Home Insurance Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,657

THE HOME INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,

Defendant.

APPELLANT'S ADOPTION OF DESIGNATION OF RECORD AND STATEMENT OF POINTS

Pursuant to the provisions of Rule 17 (6) of the above-entitled court, appellant hereby adopts as though set forth herein in full the designation of contents of record on appeal and the statement of points, both dated January 3, 1955, filed with the United States District Court and made a part of the typewritten transcript on file herein.

Dated: February 18, 1955.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Appellant.

[Endorsed]: Filed February 19, 1955.

Affidavit of Service by Mail attached.

[Title of Court of Appeals and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated by the parties to the above-entitled appeal, by and through their respective counsel, that the record on appeal be printed in accordance with the designation heretofore filed, except with respect to Exhibits "B" and "C" attached to the pretrial order, which shall be modified as follows:

(a) Exhibit "B"—It is stipulated that said exhibit contains copies of the bills of lading and prepaid freight bills covering the goods destroyed. Said bills are substantially identical except for variations not material to this appeal. Therefore, it is agreed that the record on appeal need contain only a copy of (1) the bill of lading, dated May 30, 1950, and (2) the prepaid freight bill of said date.

(b) Exhibit "C"—This exhibit contains a copy of the applicable freight tariff (No. 403-B) and its supplement (No. 25). Only the following items from said tariff need be reproduced as a part of the record on appeal, it being agreed that the remainder of said exhibit is not material to the appeal:

(1) Freight Tariff No. 403-B:

Item 50 (Note 3 only).....Page 5
Items 55, 60 and 65.....Page 5
Items 75 and 80.....Page 6

(2) Supplement No. 25, Freight Tariff No. 403-B:

Item 70-I (Note 10 only).....Page 5

Dated March 22, 1955.

CLAYSON, STARK &
ROTHROCK,

By /s/ DONALD D. STARK,
Attorneys for Appellant.

/s/ THOMAS P. MENZIES,
Attorney for Respondent.

[Endorsed]: Filed March 24, 1955.

No. 14,657

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,
Appellant,

vs.

THE HOME INSURANCE COMPANY, a Corporation,
Respondent.

APPELLANT'S OPENING BRIEF.

CLAYSON, STARK & ROTHROCK,
By DONALD D. STARK,
Citizen's Bank Building,
Corona, California,
Attorneys for Appellant Exchange Lemon Products Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

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No. 14,657

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EXCHANGE LEMON PRODUCTS COMPANY, a Corporation,

Appellant,

vs.

THE HOME INSURANCE COMPANY, a Corporation,

Respondent.

APPELLANT'S OPENING BRIEF.

Pursuant to Rule 18 of the above entitled Court, Appellant Exchange Lemon Products Company, presents herewith its opening brief in the above entitled action.

Jurisdiction.

District Court. This is a diversity case (Title 28, §1332, U. S. Code) wherein Respondent The Home Insurance Company is a New York corporation [Complaint, Par. II, Tr. p. 3*] and Appellant Exchange Lemon Products Company is a California corporation. [Complaint, Par. III, Tr. p. 4.] The amount involved, to wit: $161,-

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*All transcript references are to pages in the printed Transcript of Record.

991.63 [Amended Counterclaim, Par. VI, Tr. p. 13; Pretrial Order, Tr. p. 18], is in excess of $3,000.00, exclusive of interest and costs of suit.

Court of Appeals. This appeal is from a final judgment entered December 30, 1954. [Tr. p. 75.] The appeal to this Court is pusuant to Title 28, Section 225(a) of the United States Code. Notice of appeal was duly filed on January 4, 1955. [Tr. p. 76.] Appellant's statement of points to be relied upon, which was filed on said date in the District Court [Tr. p. 77], has been adopted in this Court. [Tr. p. 79.]

Statement of the Case.

This is an action for declaratory relief brought by the Respondent, hereinafter referred to in this brief as "Home Insurance," against its insured, the Appellant, hereinafter referred to in this brief as "Exchange Lemon." A counterclaim based on the insurance policy which is the subject of the declaratory relief complaint was filed by Exchange Lemon against Home Insurance. A jury trial was demanded. [Tr. p. 7.]

By the allegations of its Amended Answer [Tr. p. 8] and Amended Counterclaim [Tr. p. 10] Exchange Lemon specifically pleaded the existence of trade usage relating to the critical terminology in the insurance contract. [Amended Answer, Par. II, Tr. p. 8; Amended Counterclaim, Par. IV, Tr. p. 12.]

In order to allow this Court to fully understand the significance of the trade usage involved, a narrative state-

ment taken from the pretrial memorandum of Exchange Lemon (not a part of the Transcript of Record), is attached as an appendix hereto.

In the Pretrial Order [Tr. p. 17] it was stipulated that among the issues of law were the questions of (1) the existence of ambiguity in the terms of the policy [Tr. p. 21], and (2) the right of Exchange Lemon to introduce testimony relating to the trade usage as pleaded. [Tr. p. 20.] It was stipulated that if the Court ruled that Exchange Lemon could introduce testimony on the issue of trade usage, several questions of fact were presented by the pleadings. [Tr. pp. 19-20.]

The District Court in its decision [Tr. p. 66], which serves as findings and conclusions pursuant to Rule 52(a) F. R. C. P. [Tr. p. 72], held that:

> (a) "The language of the contract is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72]; and
>
> (b) "Sustained Home Insurance's objection to Exchange Lemon's offer of evidence of trade usage, and held that there were no issues of fact to be submitted to a jury." [Tr. p. 67.]

Exchange Lemon made a full written offer of proof [Tr. p. 36], and the Court thereupon entered its judgment declaring that Home Insurance had no liability on the insurance contract and that Exchange Lemon should take nothing by its counterclaim. [Tr. p. 73.]

The questions thus raised on this appeal relate to the District Court's decision to not submit the case to a jury,

its holding as a matter of law that the insurance contract was not ambiguous, and its holding as a matter of law that evidence of trade usage could not be presented.

Specification of Errors.

(1) *The Court erred in refusing to impanel a jury or to allow introduction of any evidence.* In view of the Court's ruling, no jury was impaneled, no trial was had, and no evidence was introduced. Exchange Lemon, however, made a formal written offer of proof consisting of the testimony of Tom Borden [Tr. pp. 36-50], C. S. Connelly [Tr. pp. 51-55], Harold S. Scott [Tr. pp. 55-59] and a portion of the deposition of James S. Jennings. [Tr. pp. 60-65.]

(2) *The Court erred in refusing to allow introduction of evidence on the issue of trade usage.* The pleadings and offer of proof establish that Exchange Lemon was engaged in the transportation trade as a shipper. [Tr. p. 11 (Amended Counterclaim, Par. II); Tr. p. 47 (Borden); Tr. p. 52 (Connelly)]; and Home Insurance was engaged in the business of issuing transportation insurance policies to shippers [Tr. pp. 22-28] and its agent who wrote the policy in question had full knowledge of the particular trade usage. [Tr. p. 12 (Amended Counterclaim, Par. IV); Tr. p. 64 (Jennings).]

(3) *The Court erred in refusing to allow introduction of evidence on the issue of ambiguity of the insurance contract.* The following language from the Transportation Policy contains an inherent ambiguity:

"This policy covers while the insured property is in due course of transit on any truck, trailer, railroad car, or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage." [Tr. p. 23.]

The ambiguity arises from the coverage of the goods in "warehouses" although not "while in storage." The ambiguity is emphasized and heightened if the above quoted language is laid against the quoted language in the second defense in the Answer by Home Insurance to the Amended Counterclaim. [Tr. p. 15.]

Summary of Argument.

(1) *The Court erred in refusing to impanel a jury or to allow introduction of any evidence.*

(a) Exchange Lemon interposed a demand for jury trial and had a right to the same on all issues of fact.

(b) The District Court necessarily made determinations of factual issues in its decision, findings and conclusions.

(c) Exchange Lemon's offer of proof demonstrates the error in the District Court's refusal to admit evidence or impanel a jury.

(2) *The Court erred in refusing to allow evidence on the issue of trade usage.*

(a) Exchange Lemon is engaged in the transportation trade.

(b) Home Insurance, as an insurance company, is charged with knowledge of the usages of the trade insured.

(c) Home Insurance had actual knowledge of the trade usage.

(3) *The Court erred in refused to allow evidence on the issue of ambiguity.*

(a) The insurance contract was ambiguous on its face.

(b) The ambiguity was emphasized in the Home Insurance's pleadings.

(c) The insurance policy is to be construed against the insurer in the event of ambiguity.

(d) Exchange Lemon offered evidence to cure the ambiguity.

ARGUMENT.

1. The Court Erred in Refusing to Impanel a Jury or to Allow Introduction of Any Evidence.

The Court by its decision totally denied Exchange Lemon the opportunity to introduce proof at a trial in support of its pleadings and allegations. In doing this, the Court erroneously proceeded on the theory that there were no issues of fact involved in the case but only questions of law, all of which it decided adversely to Exchange Lemon.

(a) Exchange Lemon Made a Timely Demand for Jury Trial [Tr. p. 7] and Had a Right to the Same on All Issues of Fact. (Rule 38(c), F. R. C. P.)

> "The construction of all written instruments belongs to the Courts. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as any local or commercial meanings attached to particular words by usage; *and the ascertainment of this is for the jury.* But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court." (IX Wigmore (3rd Ed.) pp. 522-523, §2556.) (Emphasis added.)

(See also Annotation at 170 A. L. R. 383.)

(b) The District Court Necessarily Determined Factual Issues in Its Decision, Findings and Conclusions.

> "That the instant action is not such a case is clear, for plaintiff [Home Insurance] is engaged in the insurance business and defendant [Exchange Lemon] in the business of marketing citrus products." [Tr. p. 69.]

> "However, defendant [Exchange Lemon] erroneously contends that, as a shipper it is engaged in the transportation trade. The mere fact that one arranges for transportation of property does not mean that such person is engaged in the transportation trade any more than everyone who has a bank account could be deemed to be engaged in the banking trade within the meaning of the rule." [Tr. p. 70.]

Although it does not expressly appear in the pleadings that Exchange Lemon is "in the business of marketing citrus products," that fact may be assumed for purposes of argument. Nevertheless, nowhere in the record does it appear that, this is the *only* trade in which Exchange Lemon is engaged. The only stipulation of fact in this regard in the Pretrial Order is that Exchange Lemon "is a California corporation authorized to and actually engaged in business in the State of California." [Tr. p. 17.]

The factual determination that Exchange Lemon is not engaged in the transportation trade is the fundamental factual postulate upon which the erroneous decision of the District Court is predicated. The determination of that critical *factual* issue by the Court, and its consequent refusal to submit such issue to a jury is the essence of the error complained of.

The District Court by the very nature of its decision purports to lift itself by its own boot straps, *i. e.,* it refuses to impanel a jury or allow the introduction of any evidence because there are no issues of fact; the reason that no evidence can be introduced is that trade usage as claimed in the pleadings cannot be shown; and trade usage cannot be shown because *as a matter of fact* the trial court finds that Exchange Lemon is not engaged in the transportation trade.

(c) Exchange Lemon's Offer of Proof Demonstrates the Error in the District Court's Refusal to Admit Evidence or Impanel a Jury.

Although the decision of the trial court excluding the introduction of *any* evidence left Exchange Lemon in a position to set forth on appeal any statement of proposed or claimed proof which it might desire, Exchange Lemon nonetheless made a written offer of proof in the form of the statements of its proposed witnesses substantially as taken in the course of trial preparation. A review of those statements will demonstrate not only the existence of a factual issue regarding the question of whether Exchange Lemon was engaged in the transportation trade, but strong evidence indicating a contrary conclusion to that reached by the trial court.

First, as to the existence of a trade as among shippers of goods (as distinguished from carriers) there is the following testimony:

> "Q. Mr. Borden, are there other persons situated similarily to yourself, that is, traffic managers, with other companies? A. Yes; all large shippers have traffic managers or persons performing such duties.
>
> Q. Are there any associations or trade organizations of traffic or transportation personnel? A. Yes. Traffic clubs, transportation clubs.
>
> Q. Are those on a local or national level? A. They are on both. Local clubs are generally affiliated with the Associated Traffic Clubs of America.
>
> Q. Are there any trade publications of the transportation trade? A. Yes; the chief of which is the Traffic World.
>
> Q. Is that a national publication? A. It is.

Q. What does it contain? A. It contains court decisions, decisions of the Interstate Commerce Commission, and pertinent facts and information relative to different modes and types of transportation which is of interest to the traffic man only." [Tom Borden, Tr. p. 46.]

"Q. Is your type of business such that there is an association or grouping of transportation men, that is, is it an occupation or trade which has men in similar positions in other companies? A. Yes.

Q. And do you have associations of traffic men in the United States? A. We have the national organization known as the National Industrial Traffic League and the membership of that league is composed of men who occupy positions similar to mine in other companies throughout the United States.

Q. Are there any publications put out particularly for or by the traffic men? A. Well, the league puts out a weekly bulletin showing important happenings in the transportation field during that week and they also put out another publication called the Legislator which deals with changes in legislation affecting transportation. The Traffic World is a national publication devoted to transportation and is largely read by the traffic men throughout the country." [Connelly, Tr. p. 52.]

The fact that Exchange Lemon is engaged in the transportation trade as a shipper is fully demonstrated by Mr. Borden's testimony:

"Q. *During the period from 1941 to the present, was Exchange Lemon Products Company engaged in the transportation trade?* A. *Yes.*

Q. Would you amplify that answer. A. By way of illustration, in 1953 we shipped approximately 950

cars of products in interstate commerce by rail carriers; in 1946, 125 cars." (Emphasis added.) [Tr. p. 47.]

It thus appears that the trial court in reaching its conclusion that evidence of trade usage was inadmissible, had to make a factual determination squarely contrary to the testimony in Exchange Lemon's offer of proof. That offer showed unequivocally that Exchange Lemon was engaged in the transportation trade. In view of the demand for jury trial, it is submitted that it was error for the trial court to make the factual determination of this critical question.

2. The Court Erred in Refusing to Allow Evidence on the Issue of Trade Usage.

The allegations of Paragraph II of the Amended Answer [Tr. p. 8] and of Paragraph IV of the Amended Counterclaim [Tr. p. 12] set forth the trade usage of the term "due course of transit" as used in the insurance policy in question. It is a well established rule, and one with which the district court did not disagree, that evidence may be introduced to establish trade meaning of particular terms for the purpose of interpreting the language of a contract. (Cal. Civ. Code, §§1644, 1645; *Callahan v. Stanley,* 57 Cal. 476; *Ross v. Frank W. Dunne Co.,* 119 Cal. App. 2d 690, 697, 260 P. 2d 104 (1953); Wigmore on Evidence (3d Ed., §2463), even where such trade usage is squarely contrary to the normal usage of the terms involved. (*Ermolieff v. RKO Radio Pictures,* 19 Cal. 2d 543, 122 P. 2d 3).)

(a) Exchange Lemon Is Engaged in the Transportation Trade.

The District Court, while apparently agreeing with the foregoing general principle, limits the rule regarding trade usage to a case where "both parties are engaged in that trade." [Tr. p. 69.] The Court then disposes of the applicability of the rule to this case by concluding *as a factual matter* that Home Insurance is engaged in the insurance business and Exchange Lemon is engaged in the business of marketing citrus products. [Tr. p. 69.] However true this may be as a general statement of the primary businesses of the parties, it does not foreclose inquiry as to whether, in the conduct of that primary business, they are not also engaged in several specific trades, including the transportation trade. The offer of proof, and particularly the direct affirmative statement by Mr. Borden above quoted [Tr. p. 47], must be taken for purposes of this appeal as establishing that Exchange Lemon is engaged in the transportation trade as a shipper. That such a trade actually exists is sustained by the testimony of Mr. Borden and Mr. Connelly. [Tr. pp. 46, 52.]

(b) Home Insurance, as an Insurance Company, Is Charged With Knowledge of the Usages of the Trade Insured.

This rule is succinctly stated at 25 Corpus Juris Secundum, Custom and Usage at page 87, as follows:

> "It is settled that insurance companies are bound to inform themselves of the usages of the particular business insured, and that there is a conclusive presumption of their knowledge of such usages, provided the usage is general and of universal notoriety in the trade where the insurance is effected . . . Underwriters insuring by certain words are presumed

> to know and to contract with reference to the mercantile meaning of the words in the particular trade. Such meaning may be local, but must be in force among persons engaged in the trade. The policyholder is not chargeable with general customs of insurance companies, and, likewise, the usages of particular insurers must be shown to have been known in order to be binding on the insured. . . ."

The policy involved is denominated "Transportation Policy" [Tr. p. 22] and deals with the insurance of goods of a shipper in the transportation trade.

(c) Home Insurance Had Actual Knowledge of the Trade Usage.

Wholly apart from the question of whether Exchange Lemon was engaged in the transportation trade and whether Home Insurance is chargeable with the usages of that trade, it appears clearly from the offer of proof that James S. Jennings, agent of Home Insurance [Tr. pp. 17 (Pretrial Order) and 60], was "a traffic expert" [Tr. p. 61], based upon his many years of experience in the transportation trade *as a shipper.* [Tr. pp. 61-62.] It further appears from Mr. Jennings' testimony that he was familiar with the term "storage in transit" [Tr. p. 62] and in fact discussed its meaning with representatives of Exchange Lemon. [Tr. p. 64.] It appears from Mr. Borden's testimony in the offer of proof that Mr. Jennings not only knew of the trade meaning of the term but negotiated the policy in light of that meaning. [Tr. pp. 39-41.]

3. The Court Erred in Refusing to Allow Evidence on the Issue of Ambiguity.

One of the stipulated issues set forth in the pretrial order was: "Was there any ambiguity in the terms of the policy defining the coverage afforded thereby?" [Tr. p. 21.] The trial court found that "the language of the contract is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72.]

(a) The Insurance Contract Was Ambiguous on Its Face.

The critical insuring language in the contract is as follows:

> "This policy also covers while on docks, wharfs, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage."

There is an inherent incompatibility between the terms "in warehouses" and "in due course of transit and not . . . in storage" if those terms are taken in their normal sense. The use of coverage in a "warehouse" necessarily denotes storage in the ordinary sense of that term. It is not a part of what might ordinarily be considered "due course of transit." It is the position of Exchange Lemon that as a matter of law the insurance contract was ambiguous on its face in this regard and that Exchange Lemon was entitled to introduce evidence of an extrinsic nature to cure that ambiguity.

(b) The Ambiguity Was Emphasized by the Home Insurance's Pleadings.

Home Insurance, in its Answer to the Amended Counterclaim has furnished the Court with the clear demonstration of the ambiguity. In the second defense in that answer, Home Insurance alleges that the policy involved in this action provides in its terms (reading stricken words but omitting italics):

> "This policy covers ~~only~~ while the ~~property~~ insured *property* is in the due course of transit ~~in the custody of:~~
>
> ~~(a) Any railroad or railroad express company and connecting conveyances.~~
>
> ~~(b) This policy also covers any movement by truck from warehouses or factories to points of leading, freight cars or freight depots.~~ *on any truck, trailer, railroad car, or other conveyance, whether such vehicle is owned by the assured or not.*
>
> "This policy also covers while on docks, wharves, piers, bulkheads, in depots, *warehouses,* stations and/or on platforms, ~~but only while in the custody of a common carrier incidental to transportation.~~ *but only while in due course of transit and not if such property is in storage."* [Tr. p. 15.]

The changes (indicated in italics) represent the actual language of the policy in question. [Tr. p. 23.] Of primary significance is the addition of the word "warehouses" to the places where insurance covers. Also of significance is the fact that no requirement is made that the goods be in the custody of the carrier or that they

be held "incidental to transportation." All of these changes indicate the usage of the terms "in due course of transit but not while such property is in storage" in some peculiar or unusual meaning. That meaning can be reconciled only by the introduction of extrinsic evidence relating to the trade usage.

(c) An Insurance Policy Is to Be Construed Against the Insurer in the Event of Ambiguity.

(See 44 C. J. S. (Insurance §297(c)) p. 1166.) It further clearly appears from the offer of proof that the particular language of the insurance policy which is in question was actually written by Mr. Jennings, the agent of Home Insurance, who stated "I typed up this form that has been typed on that policy by the Home." [Tr. p. 65.]

(d) Exchange Lemon Offered Evidence to Cure the Ambiguity.

The following testimony is contained in the offer of proof with relation to the meaning of the term "transit" in the transportation trade:

> "Q. Mr. Borden, is there any peculiar trade usage or meaning in the transportation trade of which you are aware for the term 'transit' or 'in transit'? A. Yes.
>
> Q. Would you state what that meaning is? A. The term is used generally to apply to goods shipped or held pursuant to transit provision of the railroad freight tariffs which are lawfully on file with the Interstate Commerce Commission. Thus, goods are referred to in the trade as being in transit until they reach their final destination, from point of origin to final destination." [Tr. p. 47.]

"Q. Mr. Connelly, among traffic men engaged in the trade, is there any generally accepted usage of which you are aware for the term 'transit' or 'in transit'? A. Yes, we generally use and interpret the word 'transit' as meaning goods shipped subject to the transit privilege.

Q. Would you explain briefly what you refer to by 'transit privilege'? A. Yes. I will take grain, for example, and transport the grain to a storage or milling point and under the railway tariffs the shipper is privileged to unload the grain and record the inbound freight bill covering that grain for what is known as a transit privilege. Under the transit privilege, the shipper or owner of the grain can mill the grain or clean it or something of such sort and then reship it to another destination and, under the tariff governing the transit privilege, the shipper is accorded the through rate from the origin of the grain to the final or ultimate destination. The tariffs sometimes make a charge for the privilege and sometimes no charge is made, depending on the circumstances.

Q. Is the transit privilege restricted to stoppage for processing or reprocessing of the goods? A. No. Transit privileges cover a wide number of uses at the stoppage point. I would say the fabrication of iron and steel articles, or storage of canned goods, are among other normal transit uses. The transit privileges cover a host of different operations at the transit point. The particular transit privilege is dependent upon the provisions of the specific applicable tariff.

Q. To your knowledge, Mr. Connelly, is this trade usage of the term 'transit' of general and widespread notoriety among traffic men? A. Yes.

Q. At this time I would like to ask you a hypothetical question—that is, a question based on a hypothetical set of facts, which I would like you to answer on the basis of your experience and knowledge in the specialized transportation field in which you work.

Assume that X Company is a California shipper of substantial quantities of consumer goods throughout the United States. Y Company, in Chicago, is one of the major customers of X Company. Y Company is the only customer for the particular goods which it purchases from X Company, at least in the container here involved. Assume further that X Company ships a large quantity of the product normally sold to Y Company, together with some other general consumer goods, to a warehouse in Kansas City. All of the goods are shipped on bills of lading naming X Company as consignee and are marked 'Registered for Storage in Transit.' These goods are unloaded in Kansas City, are registered with the carrier's agent as subject to transit privileges contained in the applicable tariff. Assume that they have remained in the warehouse for eight to twelve months and no shipping instructions have been received, there being a two-year limit on the transit privilege in the applicable tariff.

Now, with those facts in mind, assume that it becomes material to determine whether the goods in question are 'in due course of transit.' As the term is used and understood generally in the transportation trade, can you state, in your opinion, whether those goods are 'in due course of transit'? A. I would say that the goods are 'in transit' since the goods were properly registered under the tariffs for the transit privilege." [Tr. pp. 52-55.]

Conclusion.

For the foregoing reasons, and on the grounds herein set forth, Appellant Exchange Lemon Products Company respectfully prays that this Court reverse the judgment heretofore entered and instruct the trial court to submit to a jury the factual issues raised by the pleadings herein.

Dated May 16, 1955.

CLAYSON, STARK & ROTHROCK,
By DONALD D. STARK,
Attorneys for Appellant Exchange Lemon Products Company.

APPENDIX.

Defendant's Contentions of Fact (From Pretrial Memorandum).

Exchange Lemon Products Company is a farmers' cooperative in the Sunkist group, which receives, processes and markets at its plant in Corona, California, all of the lemons of its members that are not sold in fresh fruit channels. In the years up until the summer of 1951, one of the largest and best outlets for these lemons was in the form of concentrated lemon juice. By 1951 the new market for the consumer packed lemon juice and lemonade products, frozen and unfrozen, had only begun to develop.

Insofar as concentrated lemon juice was concerned, there was one major customer in the United States. That customer was Puritan Company of America, distributors of ReaLemon bottled single strength lemon juice. The juice for this account was concentrated in California by Exchange Lemon Products Company, packaged in 50 gallon barrels containing preservative and shipped to Chicago where the product was reconstituted to single strength juice.

Lemon production is such that it is necessary to process a substantial portion of the annual crop in the late summer, fall and winter months when there is very little immediate market for the product. This processing was customarily done for the account of established customers but before actual quantities and delivery dates had been received.

Two problems arising from this late summer and fall production and processing of lemon juice products are of significance to this case. First, due to limited storage

facilities at the Corona plant, a very considerable problem was created in the storage of this volume of products between the time of its production and the time when it would be delivered to the customer for use the following spring and summer. Secondly, the seasonal nature of the demand for lemon products created a shipping problem in that the major purchasers were located in Chicago and other eastern markets, and a shortage of freight cars on western railroads often unduly delayed direct shipments to customs at the time of the seasonable demand.

During the latter part of January or first of February, 1946, James S. Jennings, an agent of The Home Insurance Company, contacted Mr. Tom Borden, Traffic Manager of Exchange Lemon Products Company, regarding a revision of the transportation insurance of the company.

In connection with the storage and shipping problem mentioned above, Mr. Jennings suggested to Mr. Borden that sooner or later Exchange Lemon Products Company would find it to its advantage to utilize the transit privileges provided in the railroad freight tariffs as approved by the Interstate Commerce Commission. In substance, Mr. Jennings stated: "With storage in transit, you'll be able to solve some of your warehouse problems here by not having to keep so much on hand in Corona, yet you'll have sufficient stocks strategically located for final distribution." He then indicated to Mr. Borden that the insurance policy which he proposed would cover the goods from the company's plant until they reached the customer.

Mr. Jennings and Mr. Borden were both fully aware of the provisions of the existing railroad freight tariffs and of the customs, practices and terminology of the transportation trade.

Transit privileges, or "stopping in transit privileges" or "storage in transit" or "transit" are all methods of expressing in the trade the privileges provided in the freight tariffs generally, as exemplified and particularly applicable to this case in Western Trunk Lines' Freight Tariff No. 403B. Briefly, the privilege is one of shipping goods to an intermediate point where they may be taken out of the railway car, stored or processed, and then continued on their shipment to the customer with the shipper being granted the benefit of the through rate on the entire shipment. In order to take advantage of this privilege, the shipper must register the goods as transit goods, and records thereof must be kept by the agency established for that purpose—in this case, Western Weighing and Inspection Bureau, at Kansas City.

It is customary usage in the transportation trade to refer to goods which have been shipped pursuant to such tariff provisions as "transit" goods. The term "transit" in this sense describes the goods not only while they are actually traveling on the railroad car but also while they are stopped in transit pursuant to the tariff provisions. In the trade, goods are not generally viewed as in "storage" until they have reached a final destination or customer.

This distinction is not based upon a physical difference in the warehousing facilities but rather upon the manner in which the goods are being and are intended to be handled. Thus, the defendant's claim under the insurance policy in this matter is based upon the destruction of transit goods which were held in Crooks Terminal Warehouse in Kansas City. At the same time there was a certain quantity of goods in the same warehouse which had been shipped for local Kansas City distribution and,

therefore, was in destination storage. No claim is made for these latter goods, which were physically segregated in the warehouse from the transit goods.

On the basis of notes taken by Mr. Jennings at his meeting with Mr. Borden, the typewritten portion of the policy in question was prepared by Mr. Jennings. When the policy was received by Mr. Borden, he read it and found it to be in accordance with his understanding, to-wit, the policy provided that it insured goods against the enumerated risks, including flood, and while in "warehouse," if in the due course of transit but not if such goods are in storage.

Thereafter, Exchange Lemon Products Company commenced to ship its products to such midwestern centers as Omaha, Dallas, and Kansas City, registered for storage in transit, prior to transshipment to ultimate destination in Chicago., New York and other eastern markets. On July 13, 1951, there were substantial stocks of lemon juice products stored in Crooks Terminal Warehouse in Kansas City, Missouri. The flood which inundated the warehouse on that day destroyed $161,991.63 worth of transit goods. Of this amount, in excess of $128,000.00 worth of the transit goods consisted of barreled concentrated lemon juice which was labeled for delivery to Puritan Company of America in Chicago.

Defendant's claim of loss for these transit goods under the policy was objected to by plaintiff who commenced this action to establish the question of liability or non-liability. Damages are stipulated, the sole question being one of interpretation of the contract. In connection with the interpretation and construction of the contract, defendant relies upon the aforesaid trade meaning of the word "transit."

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Appellant,

vs.

THE HOME INSURANCE COMPANY,
Appellee.

APPELLEE'S BRIEF.

THOMAS P. MENZIES,
HAROLD L. WATT,
JAMES O. WHITE, JR.
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

Jurisdiction.

In compliance with Rule 20 (U. S. C. A. 9, Subsec. 2b) appellee states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

> UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 2201: DECLARATORY JUDGMENTS: CREATION OF REMEDY.
>
> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other

legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1332: DISTRICT COURTS; JURISDICTION: DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States; * * *."

UNITED STATES CODE ANNOTATED, TITLE 28, SECTION 1291: COURTS OF APPEAL: FINAL DECISIONS OF DISTRICT COURTS.

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that the plaintiff is a citizen and resident of New York and the defendant is a citizen and resident of California. The amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs of suit [Tr. pp. 3-4, 10].

Statement of the Case.

Appellant, Exchange Lemon Products Company, a corporation, (hereinafter referred to as "Exchange Lemon"), has appealed from a judgment rendered in favor of appellee, The Home Insurance Company, a corporation, (hereinafter referred to as "Home Insurance"), after the court refused to admit the offer of evidence by appellant. Declaratory relief action was brought by Home Insurance against Exchange Lemon, praying for a declaration of the respective rights, duties and liabilities of the parties upon a policy of insurance issued by Home Insurance, which contained the following clause:

> "This policy covers while the insured's property is in due course of transit on any truck, trailer, railroad, car or other conveyance, whether such vehicles are owned by Assured or not. This policy also covers while on docks, wharves, piers, bulkheads, in depots, warehouses, stations and/or on platforms, but only while in due course of transit and not if such property is in storage." [Tr. p. 23.]

Exchange Lemon, by its amended counter-claim [Tr. pp. 10-13] prayed for judgment against Home Insurance in the amount of $161,991.63 and prayed for a declaration that the property damaged and destroyed was insured by Home Insurance.

It was stipulated in a pre-trial order that all of the goods destroyed had been in Crooks Terminal Warehouse, in Kansas City, Missouri, for a period of 8 months or more prior to the damage [Tr. p. 18], at the time of its destruction by flood the property was stored in the

warehouse awaiting further orders, and at the time of its destruction no orders or shipping instructions had been received or issued by the defendant [Tr. p. 19]. The bills of lading and freight bills under which the goods moved showed that the goods were consigned from Corona, California by defendant Exchange Lemon to Exchange Lemon, care Crooks Terminal Warehouse, Kansas City, Missouri, with the words "destination Kansas City" in the bills of lading [Tr. pp. 29-30]. The policy of insurance insures, among other things, against fire [Tr. p. 32, numbered Par. 1]. It was stipulated in the pre-trial order that the identical goods insured by Home Insurance under its transportation policy were also insured by plaintiff Home Insurance against loss by fire while in Crooks Terminal Warehouse under a different policy [Tr. p. 19, numbered Par. 11].

By the pre-trial order and stipulation it was agreed that the *Issues of Law* were whether defendant was entitled to introduce testimony to the effect that there was a trade usage, whether the goods were in due course of transit, whether the goods were in storage, and whether there was any ambiguity in the terms of the policy [Tr. pp. 20-21]. It was also stipulated in the pre-trial order that there were no issues of fact for trial unless

> "* * * the court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy involved in this action was issued, there was in existence any trade terminology or technical meaning in the transportation trade for the term 'in due course of transit'." [Tr. pp. 19, 67.]

Statement of the Issues.

The sole issue tendered by this appeal is a question of law as to whether the court correctly held that no evidence of trade usage could be introduced under a contract provision insuring goods "only while in due course of transit and not if such property is in storage" where it was stipulated that such evidence could only be admitted if the court ruled as a matter of law that it could be admitted, and that whether the goods were in due course of transit or in storage and whether there was any ambiguity in the policy were issues of law, that although the goods were registered for storage in transit with the carrier the stipulated facts show that the goods were at the destination shown on their bills of lading, had been there for at least 8 months, that no further orders were on hand for shipment of the goods, and that the insured actually insured its interest in the identical goods, for loss by fire under a separate policy while in storage at its destination.

Summary of Argument.

ARGUMENT.

POINT ONE.

There Was No Error in Not Impaneling a Jury.

The pre-trial stipulation and order provided that whether or not Exchange Lemon would be entitled to introduce evidence of trade terminology or technical meaning of the phrase "in due course of transit" was an issue of law [Tr. p. 20]. By the same stipulation it was agreed that whether the goods were "in due course of transit" or "in storage" where issues of law [Tr. p. 20], and that whether there was any ambiguity in the terms of the policy defining its coverage was an issue at law [Tr. pp. 20-21].

It is thus apparent that by the stipulation of the parties the issue of whether or not evidence would or could be admitted on appellant's claimed trade usage was a preliminary question to be decided by the court without a jury. It does not appear to be an open question that parties may, by stipulation, broaden or narrow the issues or change the rules of evidence. (See: *Fed. Deposit Ins. Corp. v. Siraco* (C. A., N. Y. 1949), 174 Fed. 360.)

It is, moreover, a common and well recognized rule that the construction of writings and the meanings of a written instrument is a "question of law for the court" rather than a "question of fact" for the jury.

Crowe v. Gary State Bank, 123 F. 2d 513;

Anzano v. Metropolitan Life Ins. Co. of New York, 118 F. 2d 430;

Chidester v. City of Newark, 162 F. 2d 598;

Crabb v. Commissioner of Internal Revenue, 121 F. 2d 1015.

The rule is succinctly stated in American Jurisprudence, Vol. 53, Trial, Sec. 268:

> "WRITTEN CONTRACTS.—The question whether a writing is, upon its face, a complete expression of the agreement of the parties is one for the court, and subject to qualifications where the contract is uncertain and ambiguous, particularly where extrinsic evidence has been introduced surrounding facts and circumstances bearing upon intention of the parties the general rule is that where a contract has been reduced to writing, its interpretation, construction, or legal effect is for the court and not for the jury. * * * In other words, where a clear meaning can be ascertained without resort to extrinsic facts, the interpretation of a writing is for the court."

Under the stipulation of the parties and the cases cited, there was no right to a jury trial since there were no issues of fact to be tried in the determination of whether or not any evidence might be admitted on the interpretation of the written contract of insurance.

Although clearly defendant Exchange Lemon would not be entitled to a jury trial on the question of admissibility of evidence, which is the only question presented on this appeal, it further appears that no right to a jury trial would exist in any event. The parties, by stipulation, have conceded the amount of damages if the plaintiff's liability can be established [Tr. p. 19, numbered Par. 6] and have stipulated that whether defendant Exchange Lemon was entitled to introduce testimony to the effect that there was in existence any trade terminology or technical meaning for the term "in due course of transit" is an issue of law. Thus the parties by their

own agreement have limited the issues as presented in this appeal to legal matters not triable by jury.

See:

Hargrove v. American Cent. Ins. Co., 125 F. 2d 225;

State Farm Mut. Auto Ins. Co. v. Mossey, 195 F. 2d 56.

POINT TWO.

Evidence of Claimed Trade Usage Was Properly Excluded.

The policy carries the caption "Transportation Policy" and it is evident from its terms and from the stipulated facts that it was the intention of the parties to cover the goods only while being transported. Appellant complains that an ambiguity exists because of the words "in due course of transit" and of the refusal by the trial court to allow evidence of "trade" usage. It was held, however, by the trial court that "the language of the contract is unambiguous and is clearly suceptible of but one interpretation" [Tr. p. 72].

In arriving at its decision, the lower court followed familiar rules: California Civil Code, Sec. 1641: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other;" "No term of a contract is either uncertain or ambiguous if its meaning can be ascertained by fair inference from other terms thereof," (*Burr v. Western States Life Ins. Co.,* 211 Cal. 576, 296 Pac. 273, 276; *Morton v. Travelers Indemnity Company,* 121 Cal. App. 2d Supp. 855, 263 P. 2d 337); "It must be presumed that the parties meant something by

the language used," (*Bradner v. Vasquez,* 102 Cal. App. 2d 338, 227 P. 2d 559). The arguments in appellant's brief entirely ignore the fact that the contract specifically exempts coverage "if such property is in storage" [Tr. p. 34] and states "It is understood and agreed that this policy covers shipments * * * [Tr. p. 24]. Nor does the defendant attempt by its brief or by its offer of proof to assign any meaning to the phrase "not while such property is in storage" other than what is normally meant by these words [Tr. pp. 43-44].

That the property was, in fact, "in storage," is demonstrated by the stipulated facts:

> "It was consigned by Exchange Lemon to Exchange Lemon at Kansas City and was wholly owned by Exchange Lemon at all times" [Tr. pp. 18, 29-30];
>
> "The bills of lading showed the destination of the goods to be Kansas City" [Tr. pp. 29-30];
>
> "No further orders or shipping instructions had been received for the goods" [Tr. p. 19];
>
> "All of the goods had been in the Kansas City warehouse for at least 8 months prior to their destruction by flood" [Tr. p. 18].

Since the policy was "read and retained without objection by the defendant" [Tr. p. 17], there is no claim of any unusual or technical meaning to the words "in storage," and defendant Exchange Lemon has at no time up to and including the present date made any attempt to reform the policy, the trial court was amply justified in viewing the contract in its entirely together with the stipulated facts and entering judgment for plaintiff.

If the policy covered goods in storage under the clause "but only while in due course of transit" [Tr. p. 23] there would have been no reason for the exclusion of "and not if such property is in storage," [Tr. p. 23] which certainly is clear, unambiguous and to which language no explanation has been claimed or offered by appellant. It is quite conceivable that the goods might end up in a warehouse through an interruption in transportation and still be "in due course of transit," in which case they would never have arrived at the destination to which they were consigned. Such a situation can be readily conceived in the case of temporary interruption of transportation service, but the conclusion that an ambiguity exists because property "in storage" is specifically excluded from the coverage wholly fails. In the present case the goods had arrived at the destination shown on the bills of lading. It is a general rule which applies to policies of insurance that where a contract is susceptible on its face to a construction that is reasonable, resort cannot be had to evidence of a custom or usage to explain the language. (*Orient Mutual Ins. v. v. Wright,* 68 U. S. 456, 17 L. Ed. 505.) Whatever may be the general trade meaning of a particular term, such meaning is "always controlled by the express contract of the parties." (*Browning v. McNear,* 158 Cal. 525.) Usage is never admissible to vary the terms of a clear and unambiguous contract. (*May v. American Trust Co.,* 135 Cal. App. 385.)

In ascertaining the intention of the parties to this contract, which provides coverage loss by fire and flood, among other things, it is important to note that the defendant Exchange Lemon took out a separate and distinct policy of insurance, which policy is not involved in

this action, insuring the identical goods against loss by fire while in Crooks Terminal Warehouse [Tr. p. 19]. It is inconceivable that good business custom would require the payment of a separate premium for fire protection if the goods were actually considered to be insured under the transportation policy here in question. The court may also consider the fact that the policy of insurance under consideration was issued in 1946, that it was read and retained by defendant without objection [Tr. p. 17], and that this is not an action for reformation of the policy.

The term "only while in due course of transit" [Tr. p. 23] is far from identical with the term "registered for storage in transit" contained in the freight bill [Tr. p. 30], particularly when construed with the exclusionary language of the policy "and not if such property is in storage." The term "registered for storage in transit" appears nowhere in the insurance policy and is of importance only on the question of the applicable freight rate as between defendant and the railroad.

(a) Defendant's Offer of Proof Is Defective.

Defendant Exchange Lemon has, by it offer of proof, attempted to prove the meaning of the term " 'transit' or 'in transit' " in the transportation trade [Tr. pp. 47, 53] and of the term "transit privilege" [Tr. pp. 53, 57], and of the term "storage in transit" [Tr. pp. 57, 58, 63], but there is no offer to interpret, identify or clarify the actual term used in the contract of insurance, which is, "but only while in due course of transit and not if such property is in storage" [Tr. p. 23].

The proffered testimony of witnesses based upon incomplete hypothetical questions [Tr. pp. 54-55, 58-59] is

fatally defective for the same reason, since we are not concerned with the term "in due course of transit" removed from its neighboring and qualifying words contained in the policy, but rather with the entire contract as evidenced by the entire policy of insurance. Additionally, the opinions, based upon the hypothetical questions, are incompetent and non-probative. Custom and usage is a matter of fact and not of opinion and can only be established (in a proper case) by instances of actual practice and cannot be proven by the opinion of the witness.

See:

Shipley v. Pittsburgh L. E. R. Co. (D. C., Pa., 1946), 68 Fed. Supp. 395;

Ames Mercantile Company v. Kimball S.S. Co., 125 Fed. 332.

The matter contained in the "offer of proof" is further inadmissible for the reason that a written contract containing the entire agreement of the parties supersedes all prior and contemporaneous negotiations. (*Schmidt v. Mano Const. Co.,* 119 Cal. App. 2d 717, 260 P. 2d 230; *Kalnanobitz v. Rempp,* 111 Cal. App. 2d 242, 244 P. 2d 457.) Even if this rule were to be deemed inapplicable, still the offer of proof going to show what was meant by an isolated part of a phrase in the contract is not probative of the meaning of the contract when taken as a whole. The defendant, by its brief at page 13, discusses the knowledge of James S. Jennings, agent of plaintiff Home Insurance, of the term "storage in transit." The difficulty in allowing any weight to such testimony, even if testimony were admissible, is that the term "storage in transit" is nowhere to be found in the insurance policy, which

insures the goods "only while in due course of transit *and not if such property is in storage.*" (Emphasis added.)

Conclusion.

Appellee respectfully submits that for the reasons set forth in the memorandum of decision of the Honorable Trial Judge [Tr. pp. 67-73] and for the reasons set forth in this brief, the Trial Court committed no error and judgment was properly entered in favor of plaintiff. Appellee therefore respectfully prays that, upon the record presented and the authorities cited, this Court sustain and affirm the judgment.

Respectfully submitted,

THOMAS P. MENZIES,
HAROLD L. WATT,
JAMES O. WHITE, JR.,
Attorneys for Appellee.

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CLAYSON, STARK & ROTHROCK,
Citizens Bank Building,
Corona, California,
Attorneys for Appellant Exchange Lemon Products Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLANT'S REPLY BRIEF.

Pursuant to Rule 18 of the above entitled Court, Appellant Exchange Lemon Products Company, presents herewith its reply to Appellee's Brief in the above entitled action.

I.

Errors in Appellee's Statement of the Case.

Appellee The Home Insurance Company, hereinafter referred to as "Home Insurance," is in error in two significant matters in its Statement of the Case. (Appellee's Br. p. 3.)

(a) No Stipulation Re "Storage."

Home Insurance states that "it was stipulated in a pre-trial order that . . . at the time of its destruction by flood the property was stored in the warehouse. . . ." (Appellee's Br. pp. 3-4.) Inasmuch as the meaning of the term "transit" and the term "storage," as used in the insurance contract constitute the essence of this case, there was no stipulation that the goods were "stored" or "in storage" at the time of their destruction. The stipulation was merely that the goods were "situate in said warehouse." [Tr. p. 18.]* It is a fundamental contention of Exchange Lemon that the goods so situate at the time of their destruction were "in transit" and not "in storage."

(b) Home Insurance Incorrectly States the Introductory Paragraph of "Issues of Fact to Be Tried" in the Pre-trial Order.

The pre-trial order [Tr. p. 17] is composed of three main divisions. The first is a list of admissions and agreements of fact which would require no further proof on trial. [Tr. pp. 17-19.] The second is with relation to issues of fact and commences as follows:

> "Issues of Fact to Be Tried.
>
> "1. If the Court rules on the issue of law that the defendant is entitled to introduce testimony to the effect that at the time the insurance policy in-

*All transcript references are to pages in the printed Transcript of Record.

> volved in this action was issued, there was in existence any trade terminology or technical meaning of the transportation trade for the term 'in due course of transit' . . ." [Tr. p. 19.]

Based upon the above language, Home Insurance states that "it was also stipulated in the pre-trial order that *there were no issues of fact for trial unless* '* * * the Court rules on the issue of law. . . .'" (Appellee's Br. p. 4.) However, the terminology of the pre-trial order does not purport to create an exclusive list of all possible issues of fact in the case. It merely lists those issues of fact which are of primary significance and which would follow the Court's decision on the admissibility of evidence of trade usage. Home Insurance would now have the word "if" enlarged to read "there are no issues of fact for trial unless." This was not the stipulation.

Although the issues of fact recited in the pre-trial order are among the issues which would in normal course have been tried in this action, they do not necessarily include all issues of fact which might be involved in the case. Thus, when the District Court made its decision to exclude all evidence by Exchange Lemon and to refuse to impanel a jury, it necessarily made a determination on an issue of fact which neither of the parties had raised, but which issue of fact is the essence of the error here complained of. (See Appellant's Op. Br. p. 7, Pt. 1(b).)

II.

Appellee's Misstatement of the Issues on Appeal.

It is erroneously argued by Home Insurance that "the sole issue tendered by this appeal is a question of law as to whether a Court correctly held that no evidence of trade usage could be introduced. . . ." (Appellee's Br. p. 5.) On the contrary, Exchange Lemon has raised, and enumerated, three distinct issues on appeal.

The first issue on appeal relates to the error of the District Court in refusing to submit any evidence to the jury in an action at law where a demand for jury trial was made and where any decision by the Court was necessarily based upon factual determinations. The second issue on appeal is the one referred to by Home Insurance, to wit: the error of the District Court in refusing to allow the introduction of evidence of trade usage.

A third issue on appeal, and the second issue relating to the introduction of evidence, was that based upon the District Court's erroneous determination that the insurance contract "is unambiguous and is fairly susceptible of but one interpretation." [Tr. p. 72.] This latter issue relates to a determination of law on a question of the ambiguity of a writing viewed on its face and in relation to the pleadings in the case. That finding on the question of law is reviewable anew by this Court without the inhibitions inherent in the review of a factual determination of a trial court.

III.

Reply to Appellee's Argument.

(a) Argument That "There Was No Error in Not Impaneling a Jury."

In support of the above, Home Insurance first makes an argument predicated upon a misconstruction of the scope of the pre-trial stipulation (see *supra*) followed by the conclusion that "parties may, by stipulation, broaden or narrow the issues or change the rules of evidence." (Appellee's Br. p. 6.) *Fed. Deposit Ins. Corp. v. Siraco,* 174 F. 2d 360 (erroneously cited as 174 Fed. 360), is cited to support this proposition. That case involved the question of a stipulation broadening the scope of evidence which might be introduced under a general denial to cover items which otherwise might require special pleading. The Court there denied the broadening of the pleading but in the course of its opinion discussed *Insurance Company v. Harris,* 97 U. S. 331, where a stipulation was given such an effect.

Neither of the foregoing cases offers any authority for the position that the parties may, by stipulation, narrow the issues and restrict the admission of evidence by indirection and implication from the language of their stipulations. As heretofore noted, the pre-trial order does not purport to restrict the issues of fact solely and exclusively to those set forth. It merely states those major issues upon which the parties were able to agree.

The authorities set forth by Home Insurance in support of its premise that the construction of a contract

is a question of law for the Court and not a question of fact for the jury are wholly beside the point. They do nothing more than set forth the general rule, the exception to which is involved in this action. The quotation from Wigmore contained in Appellant's Opening Brief, which is significantly treated with silence in Appellee's Brief, states the full and correct rule on this point:

> "The construction of all written instruments belongs to the Courts. It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as any local or commercial meanings attached to particular words by usage; *and the ascertainment of this is for the jury.* But, subject to the amplification or the precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court." (IX Wigmore (3rd Ed.) pp. 522-523, Sec. 2556.) (Emphasis added.)

(b) Argument That "Evidence of Claimed Trade Usage Was Properly Excluded."

It is apparently the contention of Home Insurance that trade usage of the term "transit" cannot be shown because Exchange Lemon has not pleaded a special trade usage for the term "storage" which is the necessary complement to the trade meaning of the term "transit." The argument is without support in the record.

It has been the position of Exchange Lemon from the outset that the term "storage," as used in the transportation trade and when used in connection with and contradistinction to the term "transit," refers to terminal storage and does not include storage in transit. This position is clearly set forth in the language found in the

statement of Exchange Lemon's contentions set forth in the Appendix to Appellant's Opening Brief:

> "It is customary usage in the transportation trade to refer to goods which have been shipped pursuant to such tariff provisions as 'transit' goods. The term 'transit' in this sense describes the goods not only while they are actually travelling on the railroad car but also while they are stopped in transit pursuant to the tariff provisions. In the trade, goods are not generally viewed as in 'storage' until they have reached a final destination or customer." (Appellant's Op. Br., Appx. p. 3.)

This distinction between in transit storage and terminal storage is set forth in the testimony of Tom Borden in Exchange Lemon's offer of proof. [Tr. p. 43.]

Home Insurance, although taking the position that there is no issue of fact to be tried, nonetheless seeks in its brief to find some defect in Exchange Lemon's offer of proof. (Appellee's Br. p. 11.) For some reason, Home Insurance claims to have difficulty in recognizing the testimony relating to the pleaded trade usage of the term "transit." The existence of such terminology trade usage was judicially recognized as long ago as 1921 when the Massachusetts Court in *Koshland v. Columbia Ins. Co.*, 130 N. E. 41, observed in a similar case that,

> "there has grown up in connection with the carriage of animals and merchandise of sundry kinds for long distance over railroads a secondary meaning of the word 'transit.' For the benefit of owners of goods in the course of movement between widely separated localities, the railroads have established what are termed transit privileges, that is, the privilege of unloading goods and applying to them some process for their preparation for ultimate market

and reloading and carriage on to their destination as a single shipment at a through rate with or without a comparatively small additional charge. *In the abbreviation which language sometimes undergoes in the use of the word, 'transit' has acquired the meaning of this privilege of stopping over goods in the course of carriage, being almost the reverse of its primary significance."* (130 N. E. at 43, italics added.)

IV.

Appellee Does Not Contest Appellant's Argument Re Ambiguity.

One of the three major issues raised by this appeal relates to the Court's error in refusing to allow the introduction of evidence to cure the ambiguity of the insurance contract. (Appellee's Op. Br. p. 14.)

Home Insurance studiously avoided meeting this issue of ambiguity, merely reciting the finding of the trial court that the contract was unambiguous. (Appellee's Br. p. 8.) Home Insurance has thus tried to ignore the obvious evidence of ambiguity which is found by comparing the terms of the insuring clause in question with the standard insuring language erroneously set forth by it in its second defense to the Amended Counterclaim. (See discussion at p. 15 of Appellant's Op. Br.) Nor, does Home Insurance raise any question as to the sufficiency of the offer of proof on the issue of ambiguity.

The arguments made by Exchange Lemon on the issues raised by this appeal were numbered consecutively, summarized, and set forth in detailed form. The failure of Home Insurance to meet one of the three major issues raised and argued by Exchange Lemon highlights, by

default, a fundamental error in the ruling of the District Court excluding the introduction of any evidence or the impaneling of a jury.

Conclusion.

For the foregoing reasons it is respectfully submitted that the Appellee The Home Insurance Company has failed to meet and overcome the specifications of error contained in Appellant's Opening Brief. It is submitted that accordingly, this Court should reverse the judgment for the reasons and in the manner set forth in Appellant's Opening Brief.

Dated: June 23, 1955.

CLAYSON, STARK & ROTHROCK,
By DONALD D. STARK,
Attorneys for Appellant Exchange Lemon Products Company.

No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

GEORGE B. GRIGSBY,
WENDELL P. KAY,
HAROLD J. BUTCHER,
EDWARD V. DAVIS,
Anchorage, Alaska,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,659

IN THE

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HERALD E. STRINGER,
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vs.

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Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

I.

JURISDICTIONAL STATEMENT.

An Information was filed in the District Court of the Territory of Alaska charging the appellant as an attorney at law with various acts of professional misconduct in connection with his conduct of the defense of a person charged with crime and the fee charged for his services.

The Information was filed on September 24, 1953, and appears in the Transcript of Record on Appeal, Vol. I, pp. 1 to 5 inclusive.

The Motion to Dismiss and Answer to the Information were filed October 14, 1953, and appear in Vol. I of the Transcript, pp. 49 to 55, inclusive.

After a trial in the District Court for the Territory of Alaska, Third Division, judgment was rendered against appellant whereby, in the words of the judgment, it was

> "Ordered and Adjudged that Herald E. Stringer be deprived and suspended of the right to practice law in all of the courts of this Territory for a period of one hundred and twenty (120) days."

The judgment was rendered on October 8, 1954. Tr. Vol. I, p. 140.

On the same day a stay of execution pending appeal was granted. Tr. Vol. I, p. 141.

Notice of Appeal was filed October 20, 1954. Tr. Vol. I, p. 146.

The District Court had jurisdiction of the case by virtue of Secs. 35-2-71 to 35-2-76 of the Alaska Compiled Laws Annotated 1949.

The appellate Court has jurisdiction by virtue of new Title 28 U.S.C.A. Sec. 1291 and Sec. 1294(2).

II.

STATEMENT OF THE CASE.

1.

Facts and Circumstances.

At the time of the events hereinafter narrated, the appellant, Herald E. Stringer, was an attorney at law practicing his profession at Anchorage, Alaska.

On May 6, 1952, one Robert Lee Kemp, a taxi driver in the employ of the Radio Cab Company, was in the Federal jail in Anchorage, having been arrested the previous night on a charge of transporting a woman for the purpose of prostitution, in violation of what is known as the White Slave Act.

On either May 6 or 7, 1952, at the instance of one or more of the owners of the Radio Cab Company of Anchorage, appellant visited Kemp at the jail and was employed by Kemp to effect his release on bail, and for no other purpose. The appellant performed this service, for which he was paid a fee of $100.00. Kemp was released on May 7, 1952, on $2,500.00 bail. This terminated the relation of attorney and client.

On May 8, 1952, Kemp called at the appellant's law office for the purpose of retaining appellant to defend the white slave charge. After a general discussion of the facts and circumstances leading to Kemp's arrest, he was informed of the gravity of the offense charged, the possibility of indictment and conviction and the consequent penalties provided by statute. Also, certain aspects of the case were mentioned which might make it possible to secure a dismissal of the charge.

It was agreed at that time between the parties that appellant would undertake the defense of the criminal charge for a flat fee of $2,500.00 and would render all legal services throughout all proceedings in the case, up to and including a trial in the District Court, if necessary. The fee was to be $2,500.00 regardless of the outcome of the case or whether it was disposed of by a dismissal, plea or trial.

It was further agreed between the parties that the $2,500.00 fee was to be paid as follows: $500.00 down and the balance of $2,000.00 as soon as possible, and in any event before trial or other disposition of the case. Upon the agreement being concluded, appellant was paid $100.00 on account of the $500.00 retainer and assured that the balance would be paid shortly, or at least in a few days. Between that day, the 8th, and June 18, 1952, an additional $350.00 or $400.00 was paid by Kemp.

The foregoing statement of facts regarding the circumstances of the employment of appellant Stringer by Kemp is based upon the testimony of appellant and his witnesses in the trial of the case in the District Court.

Some of the facts as above narrated are in dispute. The testimony of the government witness, Robert Lee Kemp, was that when appellant called on him at the Federal jail with regard to the matter of bail, he retained appellant for the defense of the criminal charge against him, and that a fee of $500.00 was agreed upon and a retainer of $100.00 paid, and that thereafter, on May 8 or 9, 1952, while the relation of

attorney and client existed between appellant and Kemp, appellant exacted an agreement from him that he pay an additional fee of $2,000.00 in the event appellant effected a dismissal of the case and kept it out of court.

It is undisputed that a total fee of $2,500.00 was agreed upon between the parties, of which, according to the government's testimony, $2,000.00 was contingent upon the criminal case being dismissed and kept out of court, but according to the testimony for appellant, no part of the fee was contingent.

It is also undisputed that appellant did effect the dismissal of the criminal case on June 18, 1952, and that Kemp, between May 8, 1952, and June 18, 1952, paid appellant either $350.00 or $400.00 in addition to the $100.00 paid in appellant's office, and also on June 17 or 18, 1952, and as security for the $2,000.00 balance of his fee, gave appellant two promissory notes for $1,000.00 each, one signed by Kemp without endorsers and payable on demand, and the other signed by Kemp with guarantors. The latter note was payable in monthly installments of $100.00 each, commencing August 1, 1952. No payments or demands for payment were made on either note until the following year.

In July 1953 the appellant sent for Kemp and payment of the notes was discussed and an agreement was made that Kemp should pay $75.00 per week, and in the course of about a month, Kemp did pay a total of $215.00. Following this, Kemp made no further payments, but consulted legal counsel, inform-

ing the attorneys consulted that it was a part of his original contract with appellant that his chauffeur's license, which had been taken from him by the police department, would be restored upon the dismissal of the criminal case, and claiming that the contract had not been performed. Kemp retained one Roger Cremo for the defense of a possible civil suit for the balance of appellant's fee. Cremo went to the United States Attorney's office in Anchorage to investigate the merits of the criminal charge against Kemp and matters connected therewith, and was requested to send Kemp to the office. Shortly thereafter Kemp was interviewed by an Assistant in the United States Attorney's office, one Arthur D. Talbot. Talbot interviewed Kemp at great length—altogether for some fifteen hours—and also interviewed the parties who had guaranteed payment of the installment note, and as a result of his investigation, on September 15, 1953, caused an Information to be filed against appellant similar to the Information on which this case was tried in the District Court.

On September 22, 1953, appellant caused the depositions of Kemp and one James M. Lewis to be taken on this first Information, which resulted in an abandonment of the first Information. The Information on which this case was tried in the District Court was filed September 24, 1953.

Talbot was not employed in the United States Attorney's office during the time that the complaint against Kemp, charging him with white slavery, was filed and dismissed.

The case came on for trial in the District Court for the Territory of Alaska, Third Division, on June 17, 1954, and ended June 30, 1954. Following argument, written briefs were submitted.

Government's Brief, Tr. Vol. IV, pp. 953-968;
Defendant's Brief, Tr. Vol. IV, pp. 970-992.

Thereafter the Court filed a written Opinion, Tr. Vol. I, pp. 108-133, and Findings of Fact and Conclusions of Law, Tr. Vol. I, pp. 134-137. Judgment was rendered as stated in the Jurisdictional Statement.

2.

Questions Involved and How Raised.

(1)

Insufficiency of the Evidence to Support the Findings of Fact.

(2)

Irregularity in the Proceedings of the Court and Misconduct of the Court, whereby the Defendant was Prevented from Having a Fair Trial.

The questions as to the insufficiency of the evidence were raised by exceptions duly taken to the Findings of Fact at the time they were filed, and are now raised in accordance with the provisions of Rule 52 (b) of the Federal Rules of Civil Procedure.

The questions as to the irregularity in the proceedings of the Court and misconduct of the Court are for the first time raised on this appeal.

For the convenience of the Court in hearing the appeal on a four-volume typewritten transcript of

the record, the Findings of Fact and Conclusions of Law are hereunto appended.

Findings of Fact.

I.

That Herald E. Stringer is, and at all times herein mentioned, has been an attorney at law, duly admitted to practice in all of the Courts of this Territory.

II.

On or about the 8th day of May, 1952, there was a contract entered into between the defendant Herald E. Stringer, and Robert L. Kemp, the basis of which was that the defendant would represent Robert L. Kemp on a white slavery complaint which had been filed against Robert L. Kemp for the sum of $500.00, and further, this contract was made when the defendant went to the Federal jail and discussed the case with Robert L. Kemp and Pat Rollins. Defendant was at that time paid $100.00 of the $500.00 fee.

III.

There was a second fee set by the defendant in the sum of $2,500.00 in the defendant's office, the exact time being in dispute.

IV.

That Robert L. Kemp was led to believe that one fee would be charged to settle the case out of court, where another would be exacted if the

case went to trial, thereby implying at least that it would take a greater amount to keep the case out of Court than to try the case in Court.

V.

That the relationship of attorney-client was established between the defendant and Robert L. Kemp at the time the defendant visited Robert Kemp in the Federal Jail.

VI.

That there was an overreaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.

VII.

That one James Lewis who was part-owner of the Radio Cab Company for whom Robert L. Kemp worked, and who was the dispatcher of the company at the time the original incident occurred, acted for the defendant in his dealings with Kemp.

VIII.

The defendant, in violation of the trust and confidence of his client, knowingly failed to advise his client concerning the status, merits and probable outcome of his client's case.

Conclusions of Law.

I.

That the relationship of attorney-client had been established at the time the defendant visited Robert L. Kemp in jail and subsequent to that time, the defendant stood in a fiduciary relationship with the client.

II.

Where the relationship of attorney-client is already established, the attorney has the burden of proof of fairness and good faith in setting a fee.

III.

The setting of a fee of $2,500.00 was in violation of the fiduciary relationship which existed between the defendant and Kemp by reason of the prior contract between the defendant and Kemp.

IV.

The $2,550.00 which defendant charged his client was grossly excessive in that it bore no possible relation to the amount of work done by the defendant, the benefits obtained for the client, or the client's ability to pay.

V.

The fee of $2,550.00 was not commensurate with the true value of the services rendered.

VI.

In securing Robert L. Kemp's agreement to pay a fee of $2,550.00, the defendant was guilty of unconscionably overreaching his client.

VII.

By his conduct, the defendant tended to bring the legal profession as a whole into disrepute and to undermine the public confidence in the administration of criminal justice in the Territory of Alaska.

VIII.

The defendant has not shown that he possesses the sense of duty to his profession that the Court and the public are entitled to expect of him.

IX.

That Herald E. Stringer, the defendant herein, be deprived and suspended of the right to practice law in all of the courts of this Territory for a period of One Hundred and Twenty (120) days.

III.

SPECIFICATIONS OF ERROR.

1.

Errors in Findings of Fact.

The District Court erred in its Findings of Fact as follows:

(1) There was insufficient evidence to support Finding of Fact II, in that the clear preponderance of the evidence established that no contract was entered into between the defendant, Herald E. Stringer, and Robert L. Kemp, in the Federal jail, on or about May 8, 1952, or at any time, by the terms of which the defendant agreed to represent Robert L. Kemp in defense of a charge of white slavery, for the sum

of $500.00, or at all; and in that the evidence clearly established that the defendant, Herald E. Stringer, was employed by Robert L. Kemp in the Federal jail for the purpose of effecting Kemp's release on bail, and for no other purpose, for which service the defendant was paid $100.00, and which service the defendant performed.

(2) There was no evidence whatever in support of Finding of Fact III.

(3) There was no evidence whatever in support of Finding of Fact IV. That Finding of Fact IV does not purport to state any act done by the defendant or with his consent, approval or ratification.

(4) There was insufficient evidence to support Finding of Fact V, except insofar as the relationship of attorney and client was established with regard to the services to be performed by the defendant in securing the release of Robert L. Kemp on bail.

(5) There was no evidence whatever in support of Finding of Fact VI, in that the evidence established that the contract entered into between the defendant and Robert L. Kemp for the defense of the white slave charge against Kemp was fair and reasonable, and in that there was no evidence to the contrary, and in that there was no evidence whatever that the defendant took advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.

(6) There was no evidence whatever in support of Finding of Fact VII, in that the evidence clearly established that James Lewis acted for Robert L.

Kemp in his dealings with the defendant, and there was no evidence to the contrary.

(7) There was no evidence whatever to support Finding of Fact VIII, in that the evidence clearly established that the defendant did not violate the trust and confidence of his client, but constantly kept his client advised concerning the status, merits and probable outcome of his client's case, and in that there was no evidence to the contrary.

2.

Errors in Conclusions of Law.

Conclusions of Law I and II afford no basis for a judgment against the defendant, Herald E. Stringer. Conclusion of Law III is erroneous for the reason stated in Specifications of Error No. 4.

Conclusions of Law IV and V are erroneous in that they were not deduced from any Finding of Fact, and in that the evidence clearly established that the contract between Robert L. Kemp and the defendant, for the defense of Kemp on the criminal charge, was made while there was no relation of attorney and client between the parties and while they were dealing at arm's length; and in that the fee agreed upon was for all services it might be necessary to perform in the case.

Conclusion of Law VI is erroneous for the reasons stated in Specification of Error No. 5.

Conclusions of Law VII and VIII are erroneous in that they are based upon ill-founded Findings of Fact, and are not justified by any evidence in the case.

Conclusion of Law IX is written in the words of the judgment, Tr. Vol. I, p. 140, and is erroneous in that it is not justified by any evidence in the case.

3.

Errors in Conduct of Trial.

The irregularities in the proceedings and misconduct and acts of the Court upon which error is assigned are specified in Paragraph IV of the Statement of Points upon which appellant relies on his appeal as follows:

1. The trial judge assumed to act both as judge and prosecutor in his conduct of the trial, as appears from the Transcript of Proceedings on Trial.

2. The trial judge exhibited bias and prejudice against the defendant throughout the trial of the case, as appears from the Transcript of Proceedings on Trial.

3. Disqualification of trial judge: The trial judge failed to disqualify himself from trying the case as required by the provisions of Section 455 of Title 28 U. S. Code, by reason of being so connected with the defendant as to make it improper, in his opinion, for him to sit on the trial, all of which fully appears from the Memorandum Opinion dated March 4, 1954, Tr. Vol. I, p. 58, filed March 5, 1954, and from the excerpt of Proceedings, filed June 23, 1954, Tr. Vol. I, p. 152, both being contained in the Record on Appeal.

IV.

ARGUMENT.

1.

ON FINDINGS OF FACT.

Findings of Fact II, III, IV and V all relate to the same subject matter and will be discussed together.

In Finding of Fact II the Court finds that on or about May 8, 1952, the defendant, Herald E. Stringer, contracted with Robert L. Kemp to defend him on a criminal charge for a fee of $500.00, of which $100.00 was paid down, and that this contract was made between Stringer and Kemp in the Federal jail. Tr. Vol. I, p. 134.

Robert L. Kemp testified positively in support of Finding of Fact II, Tr. Vol. II, pp. 267 to 269.

Kemp was corroborated by Vernon Oscar Rollins, commonly called Pat Rollins. Tr. Vol. IV, pp. 856, 857, 859, 861, 863.

Kemp's testimony is rendered unbelievable by his further testimony in the record. Tr. Vol. II, pp. 318, 319, 320, 321, 324, 326.

Kemp testified that after he got out of jail and before he went to Stringer's office, he went to the Radio Cab office and talked with James Lewis about an attorney to defend him. He testified as follows:

> Q. Did you go to the Radio Cab office after you got out of jail before you went to Stringer's office?
>
> A. Yes, sir.
>
> Q. And then at that time you talked with Mr. Lewis?

A. Yes, sir.
Q. About an attorney to defend you?
A. That is quite correct.
Tr. Vol. II, pp. 318, 319.

Q. Anyhow, you went down to Radio Cab to talk with Lewis about who to hire as your attorney, didn't you?
A. That is correct.
Tr. Vol. II, p. 324.

The Court summarizes the testimony in this regard as follows:

"Kemp further testified that he was not acquainted with any attorney and that he went to the office of the Radio Cab Company where James Lewis worked, and asked him what he should do about employing counsel. . . ."
Court's Opinion, Tr. Vol. I, p. 113.

This Court will note that at no time during his conversation with Lewis at the Radio Cab office before going to Stringer's office, nor on the way to Stringer's office, did Kemp make any allusion to having already employed Stringer to defend him for a fee of $500.00, although there was every occasion for him to have mentioned it. Instead of proceeding to Stringer's office to consult him regarding the case as his employed attorney, as he claims, according to his own testimony he goes to the Radio Cab office to get the advice of Lewis, his employer, about whom to hire, and did discuss this matter fully with Lewis, even being told, as he claims, the reasons why Stringer should be employed and the possible cost of his services.

If he had already employed Stringer for a stipulated fee, he certainly would have at least mentioned it. The inevitable conclusion is that there was no contract made in the Federal jail for the defense of the case.

Although Rollins corroborated Kemp on his direct examination, he absolutely went to pieces on cross-examination. Rollins was one of the owners of the Radio Cab company. Kemp had called him in Cordova to come to Anchorage as a witness. Tr. Vol. IV, pp. 864, 867, 868, 874, 875, 876.

Rollins testified that he was present at a meeting in the jail between Robert Kemp and Mr. Stringer and took part in the discussion held at that time; that the conversation was so long ago that he could not truthfully state what the conversation was; that he could definitely remember the retainer fee; that $200.00 was supposed to have been the original retainer fee, but that maybe it was just $100.00 and that sum was supposed to be a retainer on $500.00; that the $500.00, as far as he understood, was supposed to be Stringer's fee for defending the case. On cross-examination Rollins testified as follows:

> Q. Then you are sure this $500.00 was mentioned over at the jail?
>
> A. The $500.00 had been mentioned to me, yes.
>
> Q. Mentioned at the jail or mentioned to you by Lewis?
>
> A. If the total of $500.00 was mentioned at the jail or not I will not swear to that one way or the other.
>
> Q. It may have been mentioned either before or shortly after the jail?

A. It could have been.

Q. I see. Well, now——

A. It was mentioned to me prior to the time I went to the jail.

Q. And it was mentioned to you by Mr. Lewis?

A. Right.

Q. Couldn't have been mentioned by Mr. Kemp because he was in jail?

A. He was in jail.

Tr. Vol. IV, p. 868.

Q. Well, just reading that portion of the transcript then, Mr. Rollins, are you of a firm impression which I believe you stated previously that the $500.00 you may have heard, the $500.00 mentioned, either just before going to the jail or at the jail or just after?

A. *I heard the $500.00 prior to going to the jail.*

Q. I see. Did you hear it from Mr. Stringer?

A. Jim Lewis.

Q. All right.

Q. (By the Court) That is your considered opinion, is it?

A. Yes, sir.

Q. (By the Court) And what has caused you to testify now that you heard that from Jim Lewis?

A. Jim Lewis was the only person that could have told me. Mr. Stringer did not tell me, and as he sent me up there with the $100.00 or to go up there for the retainer fee he is the only person I could have heard it from.

Tr. Vol. IV, p. 875.

Rollins came to Anchorage from Cordova at the request of Kemp and was disposed to aid Kemp in

every way possible, as is evident from his testimony. He succeeded not only in rendering his own testimony on direct examination worthless, but also succeeded in utterly destroying Kemp's testimony as to Stringer being employed in the Federal jail for the defense of the case.

Kemp's testimony is further weakened by the fact that he was impeached by witnesses of the highest repute. James H. Chenoweth testified that he was the Chief Deputy U. S. Marshal of the Third Division of the Territory of Alaska; that Kemp's general reputation for truth and veracity was very bad; that Kemp's general reputation as to his moral character was also very bad. Tr. Vol. III, pp. 541, 543.

Chenoweth also testified as follows:

> Q. All right, I will ask you this question: While you and Robert Lee Kemp were simultaneously employed by Radio Cab Company did he or did he not at any time in a conversation with you brag or state the number of meat-hauls which he had made during a previous shift?
>
> A. He did.
>
> Q. And what did you understand or what do you know to be meant by the words "meat-haul"?
>
> A. A meat-haul in cab driver's vernacular is any trip of cab transportation in which a prostitute is either carried to location of her subject or a person seeking services of a prostitute is carried to location of the prostitute.
>
> Tr. Vol. III, p. 547.

Kemp refused to deny that he talked to Chenoweth about meat-hauls. He testified as follows:

That he knew Chenoweth, now Assistant U. S. Marshal, at one time a driver for Radio Cab. Tr. Vol. II, p. 346. Kemp testified as follows:

Q. Do you recall any discussions with Mr. Chenoweth about how many meat-hauls you had made?

A. No.

Q. You don't recall any?

A. No, I can't.

Q. Did you ever tell Jimmy Chenoweth in your life that you had a good—you had made so many meat-hauls—I am using the word "meat-hauls".

A. I can't recall.

Q. You won't deny it?

A. I wouldn't say I deny it, but——

Q. You know what a meat-haul is? What is a meat-haul, can you tell the court?

A. A meat-haul is when you take a party down to a prostitute.

Tr. Vol. II, p. 347.

Q. But you say that you may have told Jimmy—bragged to Jimmy Chenoweth about how many meat-hauls you made?

A. I don't believe I did, sir.

Q. You don't believe you did. Well, are you ready to testify now that you never told Jimmy Chenoweth how many meat-hauls you made?

A. No, I am not ready to testify either way on it. I don't even remember Jimmy Chenoweth very well.

Tr. Vol. II, p. 348.

Kemp was also impeached by T. H. Miller, the Chief of Police of the City of Anchorage, who testi-

fied that he had held that office for four years; that he had known of Robert Lee Kemp for about the same time; that he knew the general reputation of Kemp for truth and veracity, and that it was not good, and that he knew his general reputation as to moral character and that it was not good.

Tr. Vol. III, pp. 679, 680.

Kemp was further impeached by Lynn W. Kirkland, who testified that he was and had been since September 1952 an Assistant U. S. Attorney at Anchorage, Alaska. Tr. Vol. III, pp. 637, 638.

Kirkland testified that Robert Lee Kemp's reputation for moral character was bad. Tr. Vol. III, p. 641.

Kirkland testified as follows:

Q. Do you know of Robert Lee Kemp?

A. I do.

Q. Do you know Robert Lee Kemp's reputation for moral character?

A. I do.

Q. What is it?

A. I found it to be bad.

Tr. Vol. III, p. 641.

Q. Now you testified as to Mr. Kemp's reputation as being bad?

A. That is correct.

Q. And who have you talked to about Mr. Kemp's reputation?

A. Naturally being in law enforcement, why, some of the various parties. I couldn't name all of them. I believe Chief of Police of the Anchorage City Police Force, Mr. Miller has informed me that he was a pimp.

Tr. Vol. III, p. 642.

Q. Now, did you talk to Mr. Miller about Mr. Kemp's reputation or as to some specific trait or another?

A. I don't understand your question.

Q. I will repeat it. Did you talk to Mr. Miller about Mr. Kemp's reputation in general or did you talk about what he did or what specifically he did?

A. In general and specifically both.

Q. Well, were you talking about the subject of his reputation when you were talking with Chief Miller?

A. Yes.

Q. And you told Chief Miller, or Chief Miller told you that this man's reputation is bad, or words to that effect?

A. Words to that effect.

Mr. Fitzgerald. No questions.

A. And to further answer the question I can name various other people in law enforcement whom I have discussed this with also.

Tr. Vol. III, p. 643.

The testimony of Robert L. Kemp that he hired Stringer in the Federal jail to defend him on the criminal charge should be disregarded. It is conclusively established by his own testimony and that of James Lewis that after Stringer visited him in jail, he went to the Radio Cab office to consult Lewis about whom to hire in his defense. The trial Court conceded this in its opinion, as heretofore stated, citing both the evidence of Kemp and Lewis.

Lewis fully corroborated Kemp in this particular. Tr. Vol. III, pp. 576, 577, 578, 579, 580, 581, 591, 594, 595, 596, 604, 616, 617, 618.

Lewis testified that he had never been convicted of a crime. Tr. Vol. III, p. 591.

Referring to the conversation with Kemp in the Radio Cab office, before going to Stringer's office, Lewis testified as follows:

Cross-examination by Fitzgerald:

Q. Now, the first time you saw Kemp after his arrest was in your office on the following day, is that correct?

A. That is correct.

Q. And as I recall there was a discussion as to who he should go to as an attorney?

A. That is true, yes.

Q. And whom did you recommend?

A. I recommended the office of Stringer and Connolly.

Tr. Vol. III, p. 594.

Q. Would you recall everything that was said at that time?

A. It would be impossible.

Tr. Vol. III, p. 595.

Mr. Grigsby. Radio Cab office?

Mr. Fitzgerald. Yes.

A. It would be impossible to recall all that was said. It has been a couple of years.

Q. Well, it's been a couple of years——

A. The important thing was that he got—he came and wanted counsel, wanted an attorney.

Q. And you really aren't very clear what was discussed, are you?

A. I am quite clear of—in my mind it is quite clear that all he wanted was an attorney. That was the object of the conference, he wanted an attorney.

Q. I know that, but what I am saying is, and will you answer my question, you don't quite remember any——

A. I don't remember the details, no.

Q. I see. And you don't recall exactly what he did say to you?

A. Other than that he needed an attorney, no, I don't recall.

Tr. Vol. III, p. 596.

Herald E. Stringer, the defendant in the Court below, was the only witness for the defense as to what took place in the Federal jail between himself and Kemp before Kemp was released on bail.

Herald E. Stringer was admitted to the bar at Anchorage, Alaska, in November 1946, and has engaged in the active practice of law since May 1948 in Anchorage. At the time of the trial of the disciplinary proceedings instituted against him, June 17, 1954, he was a citizen of high standing in the community, being a member of the Anchorage Chamber of Commerce, the Veterans of Foreign Wars, American Legion, the Elks, the Masons, the Shrine, the House of Representatives of the Alaska Legislature, Chairman of one of the interim committees of the Legislature, counselor to the local Draft Board, and also Territorial Central Committeeman and Chairman of the Divisional Committee of the Republican Party in the Third Division of the Territory of Alaska. As is well known, the Republican and Democratic political organizations send voting delegates to the National Conventions.

Federal appointments in Alaska are a matter of political patronage and the recommendations of the party organizations are as a rule followed. This is true of the offices connected with the Department of Justice, the District Judges, U. S. Marshals, U. S. Attorneys and Assistants, and subordinate offices, as the Clerk of Court and United States Commissioner.

The District Judges are appointed for a term of four years and until their successors are appointed and qualified, unless sooner removed for cause. However, as a matter of comity between political parties, they generally tender their resignations upon change of national administration. As appears from the evidence on the trial of this case hereinafter cited, both Judge McCarrey, who presided at the trial, and U.S. Attorney William Plummer, who directed the conduct of the case, felt under political obligations to the defendant, Herald E. Stringer. James M. Fitzgerald, the Assistant U. S. Attorney who tried the case, was an exception to the general rule, was an appointee of the previous administration and under no political obligations to the defendant, Herald E. Stringer.

As is shown by the testimony in the case, the defendant, Herald E. Stringer, bore an excellent reputation in the community both as a citizen and lawyer, and among his fellow practitioners, as is further evidenced by the class of lawyers who rose to his defense, as counsel and as witnesses, many of whom are well known to this Appellate Court.

The information upon which this case was tried in the lower Court was based upon the deposition of Robert L. Kemp taken on the 22nd day of September 1953.

Kemp had been a taxi-driver in the employ of the Radio Cab Company for about a year and one-half prior to May 1952 and prior to that for other companies. Tr. Vol. I, p. 7.

Chief of Police Miller testified he knew Kemp as a taxi-driver for about four years.

In decided contrast to Stringer's high standing in the community, Kemp had a bad reputation for truth and veracity and moral character. He was familiar with the life of the underworld. He knew what meat-hauls were. He had boasted of the number of meat-hauls he had made. This he refused to deny. It is apparent from the testimony in the case on the subject of meat-hauls that they were a profitable branch of the taxicab drivers' business.

In his trial brief the U. S. Attorney made the following statement:

> "There is apparently in this case only one important key government witness. He is Robert Kemp, the client whom Mr. Stringer represented in the criminal violation involved. A thorough study and review of the case reveals that the entire government case is centered about this witness. . . ."
>
> Tr. Vol. IV, p. 947.

Kemp was denominated a pimp by Miller, Chief of Police.

On the strength of the testimony of Kemp, a proven disreputable character, and the "one important key government witness", the Court resolved all the material issues in favor of the government.

The Court ignored the testimony of defendant Stringer and his witnesses.

On October 4, 1954, the Court filed a written opinion in the case in which the following statements appear:

> "Although the witness Kemp was impeached in certain respects his testimony was not completely deprived of value. Especially is this true when the court must consider the evidence which is in the power of one side to produce and of the other to contradict . . ."
>
> Tr. Vol. I, pp. 121, 122.

> "The court was also concerned over the lack of inconsistencies between the defendant and his witnesses, since in most cases under like circumstances there are differences in testimony. This absence of inconsistencies and lack of spontaneity persuade me that the defense witnesses were exceedingly well rehearsed at pre-trial discussions and precludes me from giving their testimony too much weight . . ."
>
> Tr. Vol. I, p. 122.

> "While the law is clear that the attorney is in the same position as any other person negotiating a contract for employment initially, at which time he is dealing at 'arm's length', and the relationship is not then subject to the particular scrutiny

of the court (7 CJS Attorney and Client, Section 181 (a), pg. 1047) once the relationship of attorney-client has been entered into, as I find in this case it had been (supra) the attorney stands in a fiduciary relationship to the client and any alteration of that contract will be scrutinized very closely by the court in order to determine whether or not there has been a breach of the fiduciary relationship (7 CJS Attorney and Client, Section 127(a) pg. 964) . . ."

Tr. Vol. I, p. 129.

"Since it is my conclusion that the attorney-client relationship was established when the defendant called on Kemp in jail, the fact that the defendant denied the contract entered into for the sum of $500.00 at that time I consider unimportant, insofar as defendant's culpability is concerned. Whether this prior agreement for $500.00 was made or not, it is no less culpable for an attorney to take advantage of his client's necessities and inexperience to induce him to make a contract in advance to pay an exorbitant fee for services than it is to take advantage of those necessities and inexperience to exact an unreasonable fee after the services have been rendered. Defendant's forgiveness of $1,000 of the fee does not lessen the impropriety of his conduct. Rather, it illustrates that defendant himself felt the fee to be excessive . . ."

Tr. Vol. I, pp. 130, 131.

In the language of the Court in the first statement above quoted, "although the witness Kemp was impeached in certain respects his testimony was not

completely deprived of value," Kemp certainly was impeached in certain respects; that is, with respect to his reputation for truth and veracity and moral character.

As he was not corroborated by anyone as to any facts in dispute, this impeachment, by witnesses of the highest standing, deprives his testimony of any value on every disputed question.

In the second statement above quoted the Court expresses his concern over the lack of inconsistencies between the defendant and his witnesses and accuses the defense of pre-trial discussions and rehearsals, implying misconduct on the part of the defense counsel.

Not only this, the testimony of defendant and his witnesses did not agree as to details but only as to the ultimate fact; that is, that Stringer and Kemp entered into a contract in Stringer's office in their presence, in the presence of Stringer, Connolly, Kemp and Lewis, for the defense of Kemp on the criminal charge against him. They agree that the fee was a flat fee for the defense of the case and not contingent. Assuming they were telling the truth, they could not have failed to remember the ultimate fact. On this, as to details of the conversation, they either do not remember or differ.

Stringer's testimony is clear and convincing. He testified as follows:

> Q. All right, will you continue now to set the time and place and persons present with the conversation which occurred on that occasion, to the best of your recollection, Mr. Stringer?

A. Kemp came in the office accompanied by Mr. Lewis and told me that he wanted to hire me to represent him on his case. I asked him to relate the facts to me as he knew them. He did so and a general discussion then took place with reference to the circumstances of the case. We told Kemp that the crime with which he had been charged was a serious one. We discussed the nature of the penalties if he were convicted and I told him that I would defend him for $2,500.00.

Q. Was there any discussion then as to how the fee would be paid or how?

A. I told him it would be necessary for him to pay $500.00 down and the balance of it as soon as he could get it, in any event before we went to trial.

Tr. Vol. IV, pp. 769, 770.

Q. Now, do you recall anything further with regard to that particular conversation, this first occasion of the visit?

A. I believe that when I told Kemp that we would require $500.00 down on the $2,500.00 fee either he or Lewis paid me $100.00 at that time and said they would have the balance for me within the next few days.

Tr. Vol. IV, p. 771.

In his deposition taken by stipulation before the information was filed, Stringer testified as follows:

Q. What was the amount of that fee?

A. When Mr. Kemp came in our office and employed us, I went over the facts with him at that time, and when I had ascertained the type and

nature of the crime and knew the penalties involved upon conviction, I set a fee at that time.

Q. And what was the fee which you set?

A. $2,500.00.

Q. When you set the fee of $2,500.00, Mr. Stringer, did that include legal services which were to be rendered by you at the trial of the case against Mr. Kemp in case that became necessary?

A. That fee was for representing Robert Kemp—defending Robert Kemp—in this case, whether it went to trial or was disposed of otherwise.

Q. Then, for the $2,500.00, you expected to defend him to the bitter end, excluding possibly, appeals?

A. That is correct.

Deposition of Herald E. Stringer, pp. 3, 4, 5.

Connolly testified:

Q. And at the conclusion of that conversation was a fee agreed upon for the defense of the case?

A. Well, I don't believe it was at the conclusion, but during that conversation the fee was arrived at, yes.

Q. And what was the amount of the fee arrived at?

A. $2,500.00.

Tr. Vol. III, p. 484.

Q. And what part of that was to be paid in cash?

A. There was to be $500.00 paid in cash.

Q. And was any part of that $500.00 paid in cash?

A. Sometime during that day $100.00 was paid, yes.

Q. Now, was there, it might be a little leading, but do you remember anything being mentioned as to the possibility of a dismissal?

A. That was mentioned. When we went over the case with Mr. Kemp we advised him of the maximum penalty that could be imposed and minimum penalty that the statute provided for, the things that could happen during the process of the case and the fact that it was possible that a dismissal might be obtained was mentioned, yes.

Q. Now, did the possibility of dismissal enter into the terms of the fee to be charged?

A. No, sir, it did not.

Tr. Vol. III, pp. 484 to 485.

Q. But the fee of $2,500.00—was the fee of $2,500.00 understood between you to be for Mr. Stringer to handle the defense of the case from then on through every stage that might develop?

A. Through the District Court, yes. Whatever the outcome or whatever the circumstances demanded it was to be defended through the District Court.

Tr. Vol. III, p. 486.

Q. (by Mr. Fitzgerald). Mr. Connolly, you just stated that you expected, on your last meeting with Mr. Kemp when the question of dismissal was discussed with him saying that the case had been dismissed, "How about the rest of the fee", you just stated that you expected him to pay immediately, is that correct?

A. Yes, it was understood at the time that he came to our office that he would pay $500.00 imme-

diately and he gave us to understand the other $2,000.00 would be coming very shortly.

Q. And as I understand it now the fee was to be $500.00 in cash and $2,000.00 at the conclusion of the case?

A. No, that is not right. It was to be—the fee was $2,500.00. He was to pay $500.00 immediately and the $2,000.00 as soon as he could get it.

Tr. Vol. III, p. 497.

Lewis testified as follows:

Q. Now, after this discussion and after Mr. Kemp was informed of the possible penalty the case carried, and of the toughness of the case and all that Mr. Stringer told him, was a fee agreed upon?

A. Yes, there was.

Q. And what was the fee agreed upon?

A. $2,500.00.

Q. And now just tell me what was Mr. Stringer to do for that $2,500.00?

A. He was to defend the case.

Q. And was there any conditions with regard to that agreement of $2,500.00 made as to whether the case would be disposed of by dismissal, by trial or otherwise?

A. The fee of $2,500.00 was for defending the case. There were no conditions whatsoever.

Q. And it was a fee to defend the case in whatever way——

A. In any way, yes.

Q. And he mentioned the possibility of dismissal?

A. Yes.

Q. But did the possibility of dismissal in any way enter into the fixing of the fee?

A. I didn't hear that.

Q. Did the possibility of dismissal affect the fixing of the fee in any way?

A. No. No, definitely not.

Tr. Vol. III, pp. 579, 580.

Up to October 4, 1954, the date of the Court's opinion, the crucial question in the case was whether or not Stringer was employed by Kemp in the Federal jail to defend Kemp on a criminal charge for a fee of $500.00. To this question more testimony and argument was devoted than to any other question.

Finding of Fact II is that Stringer was so employed, although the contrary was proven beyond a reasonable doubt, as has been shown. Finding of Fact II is the basis of Conclusion of Law I, which is that this employment in the Federal jail established the fiduciary relationship of attorney and client which continued thereafter, and, as stated in Conclusion of Law II, placed the burden of proof on Stringer as to his fairness and good faith in setting his fee.

Finding of Fact II is also the basis of Conclusion of Law III to the effect that Stringer violated this fiduciary relationship by setting a fee of $2,500.00 after he had already been employed for $500.00 in the Federal jail.

Finding of Fact II is also the basis of Conclusions of Law IV and V, which are to the effect that the $2,550.00 which the defendant charged his client was grossly excessive because it bore no possible relation to the amount of work done by the defendant, the

benefits obtained for the client or the client's ability to pay.

None of these considerations had anything whatever to do with the contract made in Stringer's office as he did not fix his charge on the basis of the work done, but on the work the defense of the case might involve. There had been no work done when the fee of $2,500.00 was agreed upon in Stringer's office on May 8, 1952, which is undisputed.

Finding of Fact II is the basis of the whole case against Stringer.

As stated in the Court's opinion above quoted, because of the lack of inconsistencies and differences in the testimony of Stringer and his witnesses, the Court was "precluded from giving their testimony too much weight."

But as to the paramount question—the question of the contract made in the Federal jail—Stringer had no corroboration. He was his only witness. According to the Court's opinion, he would have been better off if he had had no corroboration at all, both as to the contract made in his office and as to every other phase of the case.

On the principal issue—the contract made in the Federal jail—the evidence of Kemp and Rollins had been completely demolished before Stringer took the stand.

Yet, because Lewis and Connolly corroborated Stringer as to the contract made in the office, the Court disregards Stringer's testimony as to the contract made in the jail.

The Court bases his decision on the all-important issue on the testimony of Kemp—the impeached witness, the self-confessed meat-hauler, the pimp—as against the testimony of Stringer, a man of high standing as a lawyer and citizen and with an unblemished record until this baseless proceeding was brought against him.

Conclusion of Law VI is that in securing Robert L. Kemp's agreement to pay a fee of $2,550.00, the defendant was guilty of unconscionably overreaching his client. "Overreaching" is defined in Webster as "to cheat." The Court has branded Herald E. Stringer, a practicing attorney, as a cheater of clients.

Finding of Fact VI.

Finding of Fact VI is to the effect that this overreaching of Robert L. Kemp was by taking advantage of Robert L. Kemp's fear, ignorance, etc.

The only testimony in this case to the effect that Robert L. Kemp was ever in fear was that of Arthur David Talbot. Tr. Vol. II, pp. 235, 236.

Kemp displayed no fear throughout the trial while on the witness stand. He was always self-possessed, cool and ready with his answers. Perhap the realization that he was a government witness restored his courage.

Kemp did not testify at any time that fear played any part in the making of the contract in Stringer's office. In fact, according to his own teestimony, his chief concern was the restoration of his chauffeur's license. Apparently when he went to Stringer's office,

he was under the impression that the offense charged was trivial; that it involved a violation of city ordinances, with which he was familiar. Thereupon he was informed that he was charged with a felony; he was informed of the possible penalties which could be imposed if he was convicted; he was informed of the possibility of indictment and conviction. He was told that his being a taxi-driver would handicap him on a trial. He was told nothing which it was not Stringer's duty to tell him and Stringer would have been derelict in his duty if he had not told him what he is condemned for telling him. Kemp and Stringer agree on the information given to Kemp at Stringer's office in this respect. Advantage was not taken of Kemp's ignorance, because he was not ignorant. He was what might be termed a "wise guy."

Finding of Fact VII.

Finding of Fact VII is in substance that James Lewis, part owner of the Radio Cab Company, acted for defendant Stringer in his, Lewis', dealings with Kemp.

The evidence is absolutely to the contrary and to the effect that Lewis acted at all times as Kemp's agent and not Stringer, or else in his own interest.

Kemp requested Lewis to go with him to Stringer's office. Tr. Vol. III, p. 578.

Lewis urged the Smiths to sign the notes. He felt that Stringer had done his job and that it would be an incentive to work on the chauffeur's license if Stringer's fee was secured.

He believed at that time that the Smiths were indebted to Kemp in the amount of $600.00 or $800.00 and used that as an argument why they should sign the note.

Tr. Vol. III, pp. 587, 588.

(NOTE: Mr. Smith testified that he owed Kemp $700.00 or $800.00 and that by signing one of the notes he would be putting himself out only $200.00.) Tr. Vol. II, p. 412.

Lewis further testified that he went to see attorney Peterson at Kemp's request. Tr. Vol. III, p. 602. That he went frequently to Stringer's office with respect to the Kemp case in order to get Stringer to hurry up and get the case over as fast as possible so Kemp could recover his chauffeur's license and get back to work. (This was both in the interest of Kemp and Lewis.)

Lewis and Kemp were kept informed as to the progress of the case. Tr. Vol. III, pp. 603, 604, 605. Lewis testified that he went with Kemp to Smith's house because Kemp wanted him to do so. He believed Kemp asked him to go down there because there seemed to be some doubt in Kemp's mind as to whether they would sign the notes and Kemp wanted him to help urge them to sign. Tr. Vol. III, pp. 611, 612.

Throughout all Kemp's testimony, he corroborates the testimony of Lewis to the effect that Lewis was Kemp's agent, not Stringer's.

This question is of great importance because if Lewis were Stringer's agent, as the Court found, the improper arguments made by Lewis to induce the Smiths to sign the note, if any such improper arguments were made, would be binding on Stringer and admissible—otherwise inadmissible as not being made in Stringer's presence.

That this Finding VII was not justified by the evidence has been demonstrated. It was prejudicial error.

In view of the evidence to the contrary, it is difficult to conceive on what theory Finding of Fact VII is justified, unless the Court suspected that Lewis was a runner for Stringer, that they were in cahoots to make money out of defending taxi-drivers for their mutual benefit. Some years before the trial Stringer had obtained a divorce for Lewis. Connolly had at one time been attorney for the Radio Cab Company and each of them had defended a taxi-driver possibly because of the recommendation of Lewis. They were not highly profitable cases.

However, the Court did suspect an unholy alliance between Lewis and Stringer. During argument on the motion for a summary judgment and before any witnesses had been called, the Court asked:

> . . . Now where does Mr. Lewis fit in it.
>
> Mr. Grigsby. He doesn't fit in anywhere with any such statement as this, which on its face can't be true. It is ridiculous.
>
> Tr. Vol. II, p. 175.

The Court. Mr. Grigsby, though, the thing that bothers the court is where does Mr. Lewis fit into the picture?

Mr. Grigsby. What is that?

The Court. Based upon the testimony of the affidavit of Kemp where does Mr. Lewis fit in it?

Tr. Vol. II, p. 180.

Mr. Grigsby. . . . Your Honor repeatedly asked me where does Mr. Lewis fit in.

The Court. That is right and I state that for this reason, that is, is Mr. Lewis by an stretch of imagination an agent of Mr. Stringer?

Mr. Grigsby. Well, Your Honor, Mr. Kemp was working for Mr. Lewis. Mr. Lewis was his employer at that time. If Your Honor will remember there were cases every day in the Commissioner's Court involving white slavery charges under the City Ordinances and all the taxi-cab proprietors were constantly in court on just such transactions. If Your Honor wants to examine Mr. Lewis you will find that at that very time he spent about half of his time in Police Court on charges involving these technical white slavery transportation cases.

The Court. Well, that is just my point now, was there any relationship between Lewis and Stringer because of that?

Mr. Grigsby. Why Mr. Stringer had been Mr. Lewis' attorney. He wasn't then, but he had been his attorney in several matters. Mr. Lewis recommended Mr. Stringer as an attorney to Mr. Kemp. Mr. Kemp is working for Mr. Lewis, and Mr. Kemp wants to know, "Who will I get to defend me", and he says, "Those fellows that got you out on bail are all right and I will take you

up to them". That is conceded by everybody, that Lewis took Kemp to Stringer as his employer and took him to Stringer because he thought, we will have Stringer—does a man have to have a relationship with an attorney to recommend him as an attorney? He had had satisfactory relations with him, which would lead him to make the recommendation.

Tr. Vol. II, pp. 188, 189.

During the examination of the first government witness, Talbot, the following occurred:

The Court. Mr. Talbot, did Mr. Kemp give you the impression or any information concerning the relationship between Mr. Lewis and Mr. Stringer, if any?

A. Well, only that Kemp said he knew that Mr. Stringer was Lewis' attorney and that he understood that they were pretty close friends.

The Court. Did he indicate in any way or any manner whatsoever that Mr. Stringer might be paying Mr. Lewis something for this—bringing these cases to him?

A. I think he investigated that question, but he never stated that he believed it or could prove it.

Tr. Vol. II, p. 240.

Mr. Kay. May I point out, Your Honor, I don't want to be positive at all about the case, but any testimony that Mr. Smith admittedly gives out of presence of Mr. Stringer would be hearsay entirely.

The Court. Yes, I know that, but there is something very unsavory in this case, I point out

to you, counsel, between Mr. Lewis and Mr. Stringer and the court can't put his hand on it.

Mr. Kay. I can't see anything unsavory.

The Court. That is the court's opinion.

Mr. Kay. In fact, it amazes me that the court's opinion, as a practicing attorney yourself, Your Honor, that you have——

The Court. You will have a chance to argue it, Mr. Kay. It is improper at this time.

Mr. Kay. I just want to comment on the use of the word "unsavory". I want the court to know I resent it.

The Court. Now, you may use that in your argument and the court would ask you to use your argument at the proper time.

Tr. Vol. II, pp. 403, 404.

"Is Mr. Lewis by any stretch of the imagination an agent of Mr. Stringer." There being no evidence to support Finding of Fact II, it must have been based on a "stretch of the imagination."

"Was Stringer paying Lewis something for bringing these cases to him."

"There is something very unsavory in this case between Mr. Lewis and Mr. Stringer and the court can't put his hand on it."

It is apparent that Finding of Fact VII, that Lewis was Stringer's agent, was based upon suspicion and conjecture. The attitude of the Court indicates a disposition to ferret out something to Stringer's detriment.

There is something "unsavory" about Finding of Fact VII.

Finding of Fact VIII.

There is no possible basis for Finding of Fact VIII in which Stringer is charged with having failed to advise his client concerning the status, merits and probable outcome of his client's case. On the contrary, the uncontradicted evidence in the case shows that Kemp himself and Lewis, acting for him, visited Stringer's office frequently for the purpose of being informed on the status of the case, both knowing that Stringer was endeavoring to get the case dismissed and both being anxious that it be dismissed in order that Kemp could recover his chauffeur's license and get back to work.

That Stringer was not motivated by the desire for personal gain in the form of fees, as found by the Court in its opinion, Tr. Vol. I, p. 126, is evidenced by the fact that Stringer obtained a note for $1,000.00 guaranteed by responsible people on June 18, 1952, payable in monthly installments of $100.00 each, bearing interest, first payment due August 1, 1952, then promptly forgot all about it for more than a year.

Sometime in July 1953, in going over his accounts receivable, he discovered this note, all of which was past due. He then sent for Kemp and obtained an agreement from him to pay $75.00 per week.

Pursuant to this agreement, Kemp made payments aggregating a total of $215.00 between July 29 and August 27, 1953, inclusive. At the time of making one of these payments, Kemp proposed that Stringer accept an automobile on which there was an indebtedness

as payment in full of the balance due on the note. He did not dispute his indebtedness to Stringer. The offer was refused by Stringer. On that occasion Kemp asked Stringer to reduce his fee, whereupon Stringer consented that upon payment of the $1,000.00 note, co-signed by the Smiths, that he would forgive the other. Tr. Vol. IV, pp. 798, 799 and 844.

Following this, Kemp made no further payments, but sought legal advice claiming to the attorneys consulted that Stringer had not obtained the recovery of his chauffeur's license and that obtaining this recovery was a part of the original agreement, and, in effect, that the consideration for the unpaid note had not been fully paid. He gave no other reason to the attorneys consulted, either according to his own or their testimony, than lack of consideration.

Having obtained the concessions above detailed, everything he asked for, Kemp then decided not to make further payments, and, as heretofore stated, retained Roger Cremo to defend a possible civil suit, then fell into the hands of Talbot, who, if he had used good judgment, would have awaited the outcome of the trial of the civil suit before deciding to ruin Stringer.

2.

ARGUMENT ON MISCONDUCT OF THE COURT.

On February 2, 1954, Judge J. L. McCarrey Jr., before whom this proceeding was tried in the District Court, caused to be filed the following order:

ORDER

Whereas, the undersigned U. S. District Judge for the Third Division, presiding in Anchorage, Alaska, has disqualified himself to hear the above entitled matter, as set forth in 54-2-1 of the 1949 Compiled Laws of the Territory of Alaska;

It is hereby ordered that the above entitled file be sent to the Honorable Harry E. Pratt, U. S. District Judge for the Fourth Division of the Territory of Alaska, presiding at Fairbanks, Alaska, for his consideration and further determination.

Done in Open Court this 2nd day of February, 1954.

J. L. McCarrey, Jr., /s/
District Judge.

Tr. Vol. I, p. 57-A.

Judge McCarrey had not, as stated in the foregoing Order, disqualified himself under the provisions of Sec. 54-2-1 Alaska Compiled Laws Annotated 1949.

The only provision contained in this section under which a judge could be disqualified is Paragraph Fifth of this section, which is as follows:

"Fifth. Whenever any party, or any attorney for any party, to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or his attorney or in favor of any opposite party, or attorney for an opposite party, to the suit, and that it is made in good faith and not for the purpose of delay. Every such affidavit shall state the facts and the

> reasons for the belief that such bias or prejudice exists, and shall be filed within one day after such action, suit, or proceeding is at issue upon a question of fact, or good cause shall be shown for the failure to file it within such time. No party or attorney shall be entitled to file more than one such affidavit in any case. The provisions of this subdivision shall apply only to the District Court."

No affidavit of prejudice was ever filed nor was any objection ever made by appellant or his attorneys to the case being tried before Judge McCarrey.

The only grounds of disqualification which Judge McCarrey could have invoked are those set forth in Sec. 455 of New Title 28 U. S. Code, as follows:

> "Sec. 455. Interest of Justice or Judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper in his opinion for him to sit on the trial, appeal or other proceeding therein."

By Sec. 460 New Title 28 U. S. Code, Sec. 455 is made to apply to the District Court for the Territory of Alaska.

As will be seen from reading Sec. 455, no litigant could invoke this section for the reason that the grounds stated why a judge should disqualify himself depend altogether on his own opinion and not in the least on the opinion of a litigant or his attorney.

Judge McCarrey was of the opinion that he was so connected with the defendant Stringer as to render it improper for him to sit on the trial, as he repeatedly stated in and out of Court. In an opinion filed March 5, 1954, Judge McCarrey stated, among other things, as follows:

> ". . . counsel have repeatedly expressed the opinion that this court is qualified to hear the case, even though this court has repeatedly expressed his opinion that he should disqualify himself because of political affiliations of the court and Mr. Stringer as well as personal acquaintanceship with him as a practicing attorney here in the City of Anchorage over a considerable period of time."
>
> Tr. Vol. I, p. 61.

In the same opinion the Court states as follows:

> "As is evidenced from the file, this case, along with another similar case, was referred to the Honorable Harry E. Pratt, District Judge at Fairbanks, Alaska, with the understanding that Judge Folta would go to Fairbanks and try cases while Judge Pratt came to Anchorage to hear this matter. However, it is to be noted that on the 4th day of February, 1954, Judge Pratt transferred the case back to this division for '. . . good cause appearing for the same . . .'
>
> "If the District Attorney or counsel for Mr. Stringer desire to file an affidavit of disqualification of this court within three days after the entrance of this opinion, the Honorable George W. Folta has agreed to hear the matter, as he does not feel that he is disqualified to hear the matter, nor are there any grounds surrounding this case

in which he should in all fairness to the government as well as to Mr. Stringer, disqualify himself.

"The tenure of this implication, and the threat, has been unfortunate, not attributable to any one person, but to a set of circumstances, and must not be permitted to stand longer.

"I, therefore, feel it is my duty to set this matter down for hearing upon the merits at an early date."

Tr. Vol. I, p. 62.

The argument on the motion referred to in the above quoted matter took place on February 18, 1954. During the argument the Court stated as follows:

"Thank you, Mr. Plummer. I think the Court should probably reply to Mr. Plummer's reference to the order and that is the fact that on the second day of February the court did refer the matter to Judge Pratt at Fairbanks, Alaska. Now, the court advised Mr. Grigsby and also Mr. Stringer and I think one or two more attorneys that he, himself, would have to disqualify himself and that has been the position the court took. . . . The court would like to hear counsel, but the court is advising all counsel at this time that for reasons which the court feels are presently personal in nature, due to the past relationship between myself and Mr. Stringer, being members of the same political faith, and Mr. Stringer, of course, recommended me to this bench I feel I could not be fair, probably, to the public in hearing the case which made Mr. Stringer prove that he was innocent—the converse should be the case.

As Mr. Plummer pointed out this is not strictly a criminal nor strictly a civil proceeding and it is a special proceeding as this court interprets it, so, therefore, the court makes that statement to all counsel that under those circumstances feels he was disqualified and states that is the position the court took—the position that it was a preliminary matter and based upon being a preliminary matter that he had a right to hear counsel on that point. Now, if I am in error the court would like to hear any counsel or the district attorneys office in that respect. Well, the court felt that he was doing a favor to Mr. Stringer in disqualifying himself because the court may have intended to make him prove his innocence, whereas it should be the converse. That is why the court acted in that respect."

Tr. Vol. I, pp. 152, 153.

In the very opinion in which Judge McCarrey recited his disqualifications to hear the Stringer case, he ordered the matter set for hearing before himself at an early date unless an affidavit of disqualification was filed within three days after the filing of the opinion. No affidavit of disqualification was filed nor could any truthful affidavit have been filed because Judge McCarrey was not disqualified under the sections of the Alaska code set out above, and it was not for the defendant to invoke Sec. 455, New Title 28 U. S. Code. No one could invoke this section except Judge McCarrey himself, and it was misconduct on his part to fail to invoke this section when he knew he came within its terms, and for him to preside at the trial of the Stringer case.

It is difficult to fathom what Judge McCarrey meant when he made the statement above quoted, that

> ". . . I feel I could not be fair, probably, to the public in hearing the case which made Mr. Stringer prove that he was innocent—the converse should be the case. . . ."

Judge McCarrey owed no duty in the case except to try it fairly and impartially between the parties. It is true, as he stated above, that the Court had frequently advised Mr. Stringer and several of his attorneys, including Mr. Grigsby, that he would have to disqualify himself because of his political obligations to Stringer. He stated in substance that if he tried the case and vindicated Stringer, he would be subjected to public criticism for having paid a political debt, unless Stringer proved his innocence. It was perfectly apparent that Judge McCarrey felt that he would be tried in the forum of public opinion and that his chief concern was his own vindication. That Judge McCarrey did consider himself on trial is apparent from his statement during the trial, as follows:

> "The Court. . . . I feel I am trying to do the fair thing by counsel, after all, the court feels, in part, he has been tried, not the defendant in this case and that isn't proper because this court is not the one that is going to have judgment. It is Mr. Stringer, and I feel that counsel have a right to be overzealous, after all, he is a brother attorney and also a brother attorney of the court, and I feel that you should do all you can to protect your client because that is why he is in the courtroom, for that protection. On the other hand, I

do expect and I think I am entitled to a certain amount of decorum in the courtroom. That gives the court reporter the courtesy of getting the record down, so you may take exceptions to the court's ruling. Supposing you find that you want to appeal this? I feel, out of best interest of your client, that you shouldn't try the court, you ought to try the case that is before the bench and not the court itself."

Tr. Vol. III, p. 676.

There were other defendants in the case besides the Court and Stringer.

The United States Attorney's office was accused of whitewashing the case. Tr. Vol. II, pp. 340, 341. Assistant United States Attorney Fitzgerald considered the office on trial and asked for an opportunity to defend the accusation.

The Court considered the United States Attorney's office on trial and granted an opportunity to the office to defend itself against the charge of attempting to whitewash the case.

At the same time he asserted he did not use the word "whitewash" and stated "You will have the right, Mr. Fitzgerald, to argue the case and to defend yourself in respect thereto." Tr. Vol. II, pp. 416-d, 416-e.

Previously that very morning, Mr. Fitzgerald had used the word "whitewash" and the Court had adopted his language as follows:

"Mr. Fitzgerald. . . . We had the newspapers here this morning . . . that when the court indi-

> cated that we had misrepresented to the court the case that it put us in the light of having, in effect, whitewashed Mr. Stringer, which is not the case.
>
> "The Court. Well, I will tell you frankly at this time I am inclined to believe that you have given the court that impression. . . . I don't care to argue with you. The point is, you asked the court for an answer and I have given it to you."
>
> Tr. Vol. II, p. 340.

Former United States Attorney Buckalew and his assistant, Talbot, were tried for hours for various derelictions. Buckalew was acquitted of accepting a bribe, although never having been accused thereof. Court's Opinion, Finding 4, Tr. Vol. I, p. 126. His acquittal did not amount to a vindication. May it be stated right here that in the writer's 53 years of law practice in Alaska he has never even heard of an accusation of venality against any Federal judge or United States Attorney. Buckalew was not so accused except by insinuation and innuendo and to intimate that such a charge had not been proven against him was a blemish on his reputation rather than a vindication.

Talbot left the Court with a threat of a perjury prosecution hanging over him; was actually tried for contempt of court in committing perjury. This Appellate Court is familiar with those proceedings.

Insinuations of misconduct equivalent to accusations can be made in the form of questions. This device is sometimes resorted to by prosecuting attorneys on fishing expeditions in the hope of discovering something to bolster up a desperate case.

On the motion for summary judgment, with which the United States Attorney's office concurred, Mr. Fitzgerald submitted the affidavit of Robert Lee Kemp dated June 11, 1954. Tr. Vol. I, pp. 98-102. In this affidavit, Kemp made the following statement:

> "At no time did Mr. Stringer either expressly or impliedly give me the impression that he would resort to any improper method of keeping this case out of court. Mr. Stringer neither suggested nor implied that he would 'fix' the case. I had the impression that Mr. Stringer might be able to 'fix' the case but I obtained that impression from Mr. Lewis."
>
> Tr. Vol. I, p. 100.

While Mr. Kemp was on the stand, this affidavit was shown to him and he identified his signature affixed thereto. The Court questioned him as follows:

> The Court. Now, did you read that affidavit before you signed it?
>
> A. Yes, sir.
>
> The Court. And did you sign that freely and voluntarily?
>
> A. Yes, sir.
>
> The Court. You weren't coerced or placed under duress to sign that?
>
> A. No, sir.
>
> The Court. Very well.
>
> Tr. Vol. II, p. 303.

These questions by the Court were a veiled accusation against Mr. Fitzgerald of having used coercion and duress in obtaining the affidavit. They were a reflection on Mr. Fitzgerald's integrity. Such conduct

might be excusable in a prosecuting attorney under the circumstances above mentioned, but for the presiding judge, presumably trying the case fairly and impartially, this strained effort to discover something detrimental to the defense was highly reprehensible.

Judge McCarrey made inconsistent and contradictory statements in connection with the whitewash accusation to an extent that is bewildering.

First, he made the "whitewash" accusation as heretofore detailed and informed Fitzgerald that he could argue his position at the end of the case. Tr. Vol. II, pp. 340, 341.

Second, later on the same day Fitzgerald asked for an opportunity to defend the charges and was informed that he would have the right to argue the case and defend himself. Tr. Vol. II, pp. 416-d, 416-e.

Third, at the next session of the Court the defense called Mr. Fitzgerald and Mr. Plummer for the purpose of showing that there was no "white-wash" and the reason Fitzgerald was conducting the prosecution. Tr. Vol. III, pp. 442-451.

Apparently the Court was incensed at their testimony. He stated as follows:

> The court is not trying the District Attorney nor the Assistant District Attorney.
>
> Tr. Vol. III, p. 449.

At the last previous session of the Court, Fitzgerald had asked to be permitted to defend the United States Attorney's office. The Court had informed him he

could do so in his closing argument. The Court also stated:

> There is no implication, as far as this Court is concerned, that there was any political claim concerning the District Attorney's office in any way, shape or form. . . . We don't want to befog the issues of this case and I don't think the counsel for the defense have acted properly with respect thereto.
>
> Tr. Vol. III, p. 451.

Both Mr. Plummer and Mr. Fitzgerald had just testified that Fitzgerald had been assigned the conduct of this case because he was under no political obligations to Stringer. There is no other possible inference to be drawn from their testimony.

The issues in the case were not being "befogged." The question of whether or not the United States Attorney's office was "white-washing" the case was an issue on the motion for summary judgment which had not yet been ruled upon and on which testimony was then being received.

It is perfectly evident that the Court was unwilling that this issue be determined by evidence. He was provoked that it was cleared up by testimony and rebuked counsel for the defense.

Later on the same day that Fitzgerald and Plummer testified, the Court stated:

> I don't want to becloud the issues of this case. The District Attorney's office is not on trial in any way, shape or form.
>
> Tr. Vol. III, p. 633.

At the conclusion of the trial the Court made a complete "about-face". He granted the motion of Mr. Groh, Assistant U. S. Attorney, who took part in the trial, "that the testimony of Mr. Fitzgerald and Mr. Plummer which, in part, explains our handling of the case, be made a part of the government's case." Tr. Vol. IV, p. 933.

The Court permitted the government to adopt the testimony which he rebuked defense counsel for introducing.

At the same time the Court acquitted the U. S. Attorney's office of misconduct. Tr. Vol. IV, pp. 933, 934.

3.

FURTHER ARGUMENT ON MISCONDUCT OF THE COURT.

Error is assigned on the misconduct of the Court, in that

1. The trial judge assumed to act both as judge and prosecutor in his conduct of the trial, as appears from the transcript of proceedings on trial.

2. The trial judge exhibited bias and prejudice against the defendant throughout the trial of the case, as appears from the transcript of proceedings on trial.

Early in the trial Judge McCarrey announced his intention to take over both the prosecution and defense of the case, interrupting the direct examination of Kemp to do so, as follows:

> I am advising all counsel at this time to take this matter very seriously, and to prosecute and defend it to the utmost of your ability. If you don't do so, the court will have to do it to the best of his ability based upon the evidence.
>
> Tr. Vol. II, p. 284.

Shortly thereafter the court accused the U. S. Attorney of "white-washing", as has been shown, but never accused the defense of any laxity. On the contrary he commended the conduct of the defense, stating that counsel for defense had a right to be overzealous because Stringer was a brother attorney. Tr. Vol. III, p. 676.

When the direct examination of Kemp, on whose testimony the government's case wholly depended, was concluded, Judge McCarrey examined him at length, before permitting the defense to cross-examine. Tr. Vol. II, pp. 304-310.

He ruined the opportunity of the defense for effective cross-examination and conceivably this was his purpose, as he had previously threatened to take over the prosecution as has been shown. At least his course enabled him to fortify Kemp against effective cross-examination.

How far can a presiding judge go in interfering with the examination of witnesses?

Besides taking over the examination of Kemp before permitting defense counsel to cross-examine, the trial judge, in instances too numerous to mention for

lack of space, interrupted the examination of witnesses with a long series of questions.

Even the defendant, Stringer, was subjected to a lengthy cross-examination by the trial judge, after both the defense and the government had concluded. Tr. Vol. IV, pp. 838-849.

After Kemp's testimony had been concluded and the government had rested, later on the same day the trial judge recalled Kemp and examined him for fourteen pages of the record. Tr. Vol. II, pp. 341-345.

Following this, Kemp was instructed to remain at hand in case the Court wanted to call him back. Tr. Vol. II, p. 348.

This gave the judge an opportunity to interview Kemp during the recesses of the Court.

Since he had assumed the right to act as prosecutor, it was consistent with that assumption that he interview all his witnesses, during recesses, in chambers or anywhere else. If he had the right to act as prosecutor, he had all the rights and duties of a prosecutor.

Canon 15 of the Canons of Judicial Ethics condemns "undue interference, impatience, or participation in the examination of witnesses."

The trial judge violated Canon 15. He continually interfered and interrupted, which, under the circumstances, was inexcusable. The government was represented by able and conscientious counsel. Had they been anywise derelict in their duty, there might have been some excuse for the undue interference of the Court.

Early in the trial he had accused the district attorney's office of "white-washing" the case.

The defense called Mr. Plummer and Mr. Fitzgerald to disprove this accusation.

Near the close of the trial Assistant U. S. Attorney Groh moved to make their testimony a part of the goverment's case and offered to produce further evidence to disprove the accusation. The Court granted the motion and further stated that he "feels that the district attorney's office has vigorously prosecuted the case and feels that no additional testimony need be taken."

Under the circumstances there was no legitimate excuse for the trial judge taking over the prosecution of the case.

A trial judge cannot act as judge and prosecutor at the same time without getting on one side or the other. It is sometimes done in Police Court, but never in courts of record.

Judge McCarrey assumed this double role, and took the government's side. However, it is evident from the record of the trial that he was hostile to the defendant from the beginning of the trial to the end. As he stated, he felt himself to be on trial. Not by the defense, however, as he intimated, but by the "public", meaning in his conception of this term, public opinion, and public opinion meaning the opinion of the immediate public, including the spectators. This assertion would not be ventured if not supported by the record.

On June 23, 1954, the following proceedings were had. Tr. Vol. III, pp. 420-430.

Mr. Fitzgerald. This morning Mr. Talbot came to me and informed me that he had conferred with Your Honor that he was requesting to take the witness stand and told me that he felt that I would accommodate him. Mr. Talbot is here now and he would like to take the witness stand.

Tr. Vol. III, p. 420.

* * * * * * *

Mr. Fitzgerald. May counsel approach the bench?

The Court. Yes, you may.

(Thereupon, counsel for the Government and counsel for the defendant approached the bench and discussion was had without the reporter.)

Tr. Vol. III, p. 422.

* * * * * * *

The Court. I want you to make that from your table so everybody hears that.

Tr. Vol. III, p. 425.

* * * * * * *

The Court. Well, that is a position of the court. I will tell you my position from the court so everybody can hear.

Tr. Vol. III, p. 426.

* * * * * * *

The Court. Well, then again, I agree with counsel. I feel that there would be a gouge in counsel's testimony in this trial and on the contrary the court wants everything to come out so everybody can hear, excepting for the more or less mundane matters before the court.

Tr. Vol. III, pp. 428, 429.

In the course of the foregoing proceedings all counsel and the judge were at the bench several times, also the court reporter except at one conference. There was no one out of hearing except the bailiff and the spectators, including newspaper reporters.

By "everybody" Judge McCarrey must have meant the audience.

Hostility to Stringer.

While the defendant was testifying in his own behalf, the following occurred:

> Mr. Kay. * * * I was going to ask him directly what elements he considered in setting the fee * * *
>
> The Court. If Mr. Stringer, above everybody, at this time realizes he is under oath——
>
> Mr. Kay. Certainly.
>
> The Court. Then judge himself, accordingly.
>
> A. I understand I am under oath, your Honor.
>
> Tr. Vol. I, p. 77.

Stringer had been sworn and knew he was under oath. The Court knew that Stringer knew he was under oath. In effect, Judge McCarrey said, "You can answer the question, but remember you are under oath." The Court's admonition served to impugn Stringer's veracity and to insinuate to the audience that perjury could be expected. It was a direct insult to the defendant.

No other witness was singled out to be warned that he was under oath. Talbot, avowedly taking the stand

to correct his previous testimony, was warned of and took the consequences.

Hostility and unfairness to Stringer is revealed in the following statement of the Court in its opinion:

> Since Kemp apprised defendant that he did not have any money, defendant agreed to take a promissory note for $2000. Defendant claimed that this sum of $2000 was then due and owing although there was no testimony that there had been more than $200 paid at that time on the alleged $2500 attorney fee, $100 by Pat Rollins for Kemp and $100 by James Lewis for Kemp, supra. The $500 difference between that which was paid down and the promissory note which he wished to extract from Kemp was never explained.
>
> Tr. Vol. I, pp. 116, 117.

The above statement is absolutely contrary to fact in every respect and had been contradicted by the testimony of Stringer, in response to a question put by Judge McCarrey himself, as follows:

> The Court. May I interrupt you. No more payments were made until after the case was dismissed?
>
> A. No, sir, that is not a fact. He made two or three payments during the early part of June, as I recall.
>
> Q. Well, were these payments large or small?
>
> A. I believe one of them was $100.00 and the other one was a $50.00 payment and the third one was $200.00, all of which the entire $450.00 or $500.00, whichever it was that he paid me. I

am a little surprised at myself for not collecting the other $50.00, but he paid that amount in from May 8 up until June 17 or 18, along in there.

Tr. Vol. IV, p. 813.

Judge McCarrey took over the examination of Stringer for eleven pages of the record, Tr. Vol. IV, pp. 838-848, and examined him in detail on the very matter which his opinion states was unexplained.

It was fully explained in response to the questions of Judge McCarrey himself. Tr. Vol. IV, pp. 841, 842. It was explained as follows:

Q. Mr. Stringer, the court would like to see your records for the amount of money paid by Mr. Kemp prior to June 17, 1952.

A. May I have—just a minute, I may have that in my pocket. I had my secretary go through the receipt book that we were using at that time, Your Honor, and the receipt book shows that on May 8 there was $100.00——

The Court. Just a moment, please. Let me put these down. And you have that receipt book available, do you?

A. I assume so. I had her examine it and make a memorandum for me. May 8, $100.00; June 13, $100.00; June 14, $50.00 and June 18, $200.00, making a total of $450.00.

Q. Let's see, that was May 8, $100.00; June 13, $100.00; June 14, $50.00 and June 18, $200.00?

A. Yes, sir.

Q. Now, does your receipt book reflect $100.00 on or about the 7th day of May?

A. 8th day of May, yes, sir.

Tr. Vol. IV, p. 842.

It is perfectly clear from the testimony cited and quoted that the notes were made out on June 17, 1952, for $2,000.00 on the assumption by Stringer that the balance of the $500.00 was immediately forthcoming, and that it would be paid simultaneously with the delivery of the signed notes, which it was, but that it was not entered in the books until June 18.

Being in doubt about $50.00 of the amount already paid, Stringer gave Kemp the best of it to that extent and had the notes made out for $2,000.00.

When Judge McCarrey wrote his opinion, he seems to have been unable to recall Stringer's explanation, elicited by himself, being too much engrossed with his endeavor to find something in the record on which to base a decision against Stringer. In fact, nowhere in the record did Judge McCarrey discover anything favorable to Stringer whose own testimony he disregarded as probably perjury. Judge McCarrey would not permit Stringer to produce his receipts. Tr. Vol. IV, pp. 941, 942, as appears from the following:

> The court is disappointed in two respects. That is, that the defense has not explained by evidence or by argument the case of Glenn Hathaway as to the fee or anything connected therewith, and, furthermore, that the defendant has not seen fit to supply the receipts for which the court asked. That has not been done by way of evidence or by way of argument. Now the court wants——
>
> Mr. Stringer. Your Honor, that is being done at this time.
>
> The Court. Too late, counselor.
>
> Mr. Stringer. Are you going to rule on it this morning?

The Court. No.

Mr. Stringer. Then I will have those receipts for you before you write your opinion. I haven't had an opportunity to see my secretary since yesterday when I was on the stand, but I saw her long enough to tell her to get those together and make those available to the court as you had requested me to do.

The Court. Counselor, I point out to you, you have practiced law. You know that after a case has once rested that is it. Now, even by way of argument or by way of evidence there has been no explanation of those two points and so at this time I feel that it is not proper for you to offer those and I will not consider them for that reason. They are not timely offered, not properly offered, although the court asked you to yesterday.

Such deliberate unfairness is unprecedented. Countless times have cases been considered reopened for the admission of an overlooked exhibit. Kemp was at hand and was not called to deny Stringer's testimony. In fact, he had the original receipts.

In this brief much space has been devoted to the misconduct of the Court and it will no doubt be noticed by this Appellate Court that defense counsel made no objections *during the trial* to Judge McCarrey presiding at the trial when clearly disqualified by Sections 455 and 460 of New Title 28, U. S. Code; to his usurping the functions of the prosecuting attorney, his Interference in Conduct of Trial, in violation of the Canons of Judicial Ethics.

It is true that counsel for defense did not object, but submitted to the Court's misconduct.

It is true, as the record shows, that the trial judge informed defense counsel, in court and privately that he felt disqualified, that he would require Stringer to prove his innocence. Counsel for defense felt that they would be able to meet every test, and believe now that Stringer did prove his innocence.

Judge McCarrey made it plain to counsel that he feared that vindication of Stringer would be regarded by the "public" as the payment of a political obligation, as a "white-wash" of the case. Counsel for the defense had at that time more confidence in Judge McCarrey than he had in himself. They believed that once he embarked on the trial of the case he would be fair and impartial. They believed he would awaken to the realization that all considerations must be disregarded except the merits of the case. Counsel labored under this delusion throughout the trial and even until the decision was rendered, otherwise counsel would not be now attempting to excuse their apparent submission to the continual misconduct of the Court. They believed that while Judge McCarrey might not be able to rise to that degree of judicial perfection achieved by a few judges, which renders them unconscious of public opinion, he might at least have that degree of courage that would enable him to disregard it for the purposes of the trial, and feel that the approval of his own conscience, his sense of the rectitude of his actions, would surmount any

consideration of temporary public opinion. Counsel for the defense were sadly disillusioned. The record indicates that the judge never for a moment forgot public opinion, as represented by the spectators; that he was "playing to the galleries." As before mentioned, he had stated, "The court feels, in part, he has been tried, not the defendant in this case." That was true. The Court did feel that he was being tried; that every eye was upon him to see whether he was going to white-wash the case; that he was the real defendant, not Stringer.

As said before, he was not the only defendant. The present U. S. Attorney's office was accused of "white-washing" the case, tried, and acquitted. It is sometimes unsafe to take in too much territory.

Buckalew, former U. S. Attorney, was acquitted of taking a bribe, of which he had never been accused, Tr. Vol. I, p. 126, leaving him with a stigma on his reputation. Talbot emerged with a threat of a perjury prosecution. Everyone connected with the defense was blackened. The testimony of the defense witnesses was discredited because the judge was persuaded that they "were exceedingly well rehearsed at pre-trial discussions", an accusation of improper conduct both by defense counsel and witnesses. Tr. Vol. I, p. 122.

The judge denominated the array of able lawyers who testified for Stringer a parade. Tr. Vol. I, p. 122. They testified that the fee charged by Stringer was reasonable, or not high enough. There were no witnesses to the contrary.

After disposing of the U. S. Attorney's office, of Buckalew, and Talbot, there were no defendants left except the judge, a self-denominated defendant, and Stringer.

The judge seemed to feel that an acquittal of Stringer would be a conviction of himself.

Self-preservation is the first law of nature.

Judge McCarrey violated Canon 34 of the Canons of Judicial Ethics, entitled A Summary of Judicial Obligation, in that he was not "just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private, political or partisan influences."

Whether he was just and impartial may be safely left to the record of the trial. That he at all times was fearful of public clamor and regardful of public praise is evidenced not only by the record of the trial, but by his open avowal, frequently expressed, that he could not be fair to Stringer, would have to compel him to prove his innocence, because of his political obligation to Stringer, that otherwise he would be accused of paying a political obligation.

Judge McCarrey not only was in his own opinion disqualified to try the Stringer case, and violated the plain provisions of Sec. 455 of New Title 28, U. S. Code when he did so, but as is apparent from the record, Judge McCarrey prejudged the case. He had made up his mind when he went on the bench to try the case that Herald E. Stringer must be sacrificed on the altar of public opinion.

This is evident because before a witness had been called, while the motion for summary judgment was being argued, Judge McCarrey said, "Is Mr. Lewis by any stretch of the imagination an agent for Stringer?" "Was Mr. Stringer paying Lewis something for bringing these cases to him?" "There is something unsavory about this case between Mr. Lewis and Mr. Stringer and the court can't put his hand on it."

Vicious and preposterous as were these utterances, the lay public at once knew that the decision against Stringer was foreordained. Everybody knew it except defense counsel, who still had faith.

4.

THE LAW OF THE CASE.

Section 55-11-51 ACLA 1949 provides:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties."

An almost identical section is found in the Revised Codes of Montana, 1921, Sec. 8993, and again in Sec. 9786.

The Supreme Court of Montana in 1934 discussed these sections, and quoting from *Coleman v. Sisson,* 230 P. 582, states:

> "The purpose of sections 8993 and 9786 adverted to was to place the lawyer upon the same footing

> as other persons, free to make his engagements with his clients as they should agree: or, in other words, to give them the same freedom to contract as is enjoyed by others of the business world." In re Maury, 34 P. (2d) 380.

Section 55-11-51 ACLA 1949 was taken from the laws of Oregon. The identical provision is in Compiled Laws of Alaska, 1933, 1913, and in Carter's Annotated Alaska Codes.

> "Prior to assuming the relation of attorney and client a lawyer may bargain for his services with one proposing to employ him and may deal with him at arm's length."
>
> *Boldt v. Baker,* 13 Ohio App. 125.

The trial Court recognized this principle in its opinion. Tr. Vol. I, p. 129.

A case on all-fours with the Stringer case was decided by the Supreme Court of Oregon in 1924. *Barber v. Jetmore,* 227 P. 523.

In that case Jetmore contracted to defend Barber, charged with assault with intent to kill, for a fee of $5,000.00. The defendant was charged in the justice court. Kemp was charged in Commissioner's Court, a justice court.

In the Oregon case the contract provided for defending the accused at the trial and through the Supreme Court, if necessary. Stringer contracted to defend Kemp through the District Court.

In the Oregon case the contract provided for the defense of the accused throughout all proceedings,

including appeal to the Supreme Court. Stringer agreed to defend Kemp throughout all proceedings, including the trial in the District Court.

Both contracts were made shortly after the arrest of the defendant, and before any proceeding was had other than the filing of the complaint in the magistrate's court.

The authorities uniformly hold that the present value of the dollar is always to be considered, in relation to the amount of judgment recovered, as compared with its value years ago. The Stringer-Kemp contract was made in May 1952. The Jetmore-Barber contract was made in April 1920. In 1920, the purchasing power of the dollar in Oregon was four times its purchasing power in 1952. A fee of $5,000.00 was equivalent to $20,000.00 in the money of 1952, at least in Anchorage, Alaska.

Stringer charged $2,500.00 to defend his client through the District Court. Jetmore charged eight times as much to defend his client through the Supreme Court.

Jetmore took part of his fee in cash, the balance in an endorsed note. So did Stringer. On account of the financial circumstances of his client, Jetmore reduced his fee. So did Stringer.

Finding of Fact VI in the Stringer case is "That there was an over-reaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship."

Barber alleged all the same facts in a suit to cancel the note, in almost the identical language. See opinion in the *Jetmore* case, page 524.

Jetmore informed his client of the seriousness of the charge and the possible penalty that might be imposed. So did Stringer.

In the Oregon case the client was claimed to be unable to understand the English language and the terms of the agreement. Kemp was a taxi-driver, familiar with the experiences of other drivers charged with white-slavery, a man of more than ordinary intelligence, read and spoke English, and in no way incapacitated from making a contract.

In the Oregon case the defendant was a Spanish Basque, against whom there was a prejudice in the community, which fact made the case against him more difficult to defend and was considered by the Supreme Court in upholding the contract.

Likewise, in the Stringer case, Kemp was informed that his being a taxi-driver made the case more difficult.

The Supreme Court stated in the Oregon case,

> "It will be remembered that the contract between Barber and Jetmore contemplated all possible exigencies of the case, * * * and while the fee charged seems large * * * we cannot, as a matter of law, hold that, in view of all possible contingencies as they appeared at the time, it was so exorbitant as to be unconscionable." Opinion, *Barber v. Jetmore,* pp. 525, 526.

In the trial Court's opinion on which the Findings of Fact are based is a Statement of Facts, Tr. Vol. I, pp. 111-125. On pages 114, 115 of this Statement of Facts the Court states:

> "* * * However, there is no question as to the fact that the merits were gone into fully at the first meeting of Kemp and Lewis at the defendant's office. Kemp, defendant and all of his witnesses state that Kemp was then advised of the seriousness of the crime with which he was charged; of the fact that since he was a taxi-cab driver and since at that time there was a drive on in the City of Anchorage to apprehend as many taxi-cab drivers as possible for infractions of the law, particularly in white slave cases, the situation was more serious for him; that there was a very good chance that the grand jury would indict him; and that he would have to go to trial and would have to serve time if convicted. At the same time the defendant was informed of the manner in which the complaining witness was dispatched by Lewis to go to Joe's Lower Level and pick up a fare in the ordinary course of business, and that there was a dispatch sheet available to confirm this fact."

The matter above quoted is a correct statement of what occurred in Stringer's office preliminary to the setting of the fee of $2,500.00 for the defense of the case.

Every fact stated is paralleled by the facts stated by the attorney for the defendant in the *Barber-Jetmore* case preliminary to the setting of the fee of

$5,000.00. Everything stated was what the attorney's duty to his client required him to state.

> "The validity of a contract or retainer, in whatsoever form or howsoever effected, whether sought by client or lawyer, is determined by the same rules of law as other contracts; and, having the mutual assent of the parties, it withstands impeachment, unless unlawful; i.e.: (1) contrary to the public law; (2) contrary to positive morality; (3) contrary to public policy. Weeks' Attorneys at Law, Sec. 364."
>
> Cited in *Beck v. Boucher,* 195 P. 996.

> "The presumption against validity of a contract entered into by parties under the relationship of attorney and client does not attach to a contract by which the relation is originally created and the compensation of the attorney fixed. In agreeing upon the terms of such a contract, the parties deal at arm's length. Cooly v. Miller & Lux, 105 P. 981, Hicks v. Drew, 49 P. 189, Boardman v. Crittenden, 198 P. 1020."
>
> Cited in *Bonelli v. Conrad,* 37 P. (2d) 141.

According to cases cited in the brief of the United States Attorney, the Courts seldom resort to disciplinary proceedings to determine the validity of contracts between attorney and client, at least not while an action is pending or impending to enforce the contract. Nor even when a suit for attorney's fees is determined adversely to the attorney, is resort had to disciplinary proceedings, except where there appears

to have been elements of fraud and overreaching and the fee charged so exorbitant as to shock the conscience.

The foregoing is especially applicable to the situation presented in the case at bar. At the time the disciplinary proceedings were instituted against Stringer, there was an action impending. Kemp had consulted an attorney in regard to the defense of an impending suit for attorney's fees, which undoubtedly would have been commenced if the disciplinary proceedings had not intervened and all the facts concerning Stringer's employment would have been brought out before a court and jury. The result of the trial would have enabled the Court and the United States Attorney to have determined whether or not disciplinary proceedings should have been brought.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This rule is not now construed to mean that any testimony at all, a scintilla, is sufficient to support the findings.

> "Circuit Court of Appeals is bound by the material facts found by District Court if supported by substantial evidence, but not otherwise."
>
> *Automotive Maintenance Mach. Co. v. Instrument M.F.G. Co.,* 143 F. (2d) 332, Syllabus 1.

"Under rule that findings shall not be set aside unless clearly erroneous a finding of fact is clearly erroneous if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence."

Fleming Adm'r v. Palmer et al., 123 F. (2d) 749, Syllabus 1, Opinion, Page 759.

"It is axiomatic that uncontradicted testimony must be followed. The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others."

Grace Bros. v. Commissioner of Internal Revenue, 173 F. (2d) 170, Opinion, Page 174 (5, 6).

"When case was heard on oral evidence by an experienced judge, findings should not be set aside."

Steinfeldt v. Haymond, 175 F. (2d) 769 (3).

"Where the evidence is conflicting Circuit Court of Appeals is bound by the findings of trial judge if supported by substantial evidence in the absence of prejudicial error in disregarding competent evidence."

Moore Bros. Const. Co. v. City of St. Louis, 159 F. (2d) 586 (1).

Judgment reversed on ground of trial court disregarding competent evidence. Same, Opinion, p. 587 (1).

V.

CONCLUSION.

Counsel for appellant contend that Herald E. Stringer did not get a fair trial nor in fact any trial. That the proceeding against him in the district Court was but the semblance of a trial, a formality necessary to give the trial judge jurisdiction to pronounce judgment.

Rule 52(a) does not vest in the trial judge arbitrary and absolute power. "Clearly erroneous" means not supported by substantial evidence, and "due regard to the opportunity of the trial Court to judge of the credibility of witnesses" means *due* regard, and nothing more.

It has been shown that there was not substantial evidence to support any Finding of Fact to which exception was and is taken. That the whole case depended on the testimony of Kemp denominated the "one important government witness" in the government's trial brief. Tr. Vol. IV, p. 947.

Kemp was impeached by the Chief Deputy Marshal and the Chief of Police as to his moral character and credibility, and by his own contradictory statements.

Judge McCarrey seems to have illogically considered this unimportant, that if notwithstanding this impeachment he disbelieved the defense witness, it followed as a matter of course that facts contrary to their testimony were established, without the support of credible evidence.

There was not a shred of evidence to support Finding of Fact VII, that Lewis was Stringer's agent. All the evidence is to the contrary.

Herald E. Stringer was found guilty of over-reaching, of cheating a client, the most reprehensible offense a lawyer can commit. He was suspended from the practice of law for one hundred and twenty days.

Counsel for appellant contend that Judge McCarrey was not concerned with the severity of the punishment, provided it was sufficiently severe to satisfy the public that he had not paid off a political obligation. He did so convince the public and had little further concern.

Stringer was granted a stay pending appeal and permitted to enjoy what law practice he could get, having been advertised as dishonorable by the judgment of the Court.

Nor is Mr. Stringer chiefly concerned with the severity of the punishment. This appeal is not taken from the sentence. It is taken from the judgment which placed a blot on the appellant's character and professional reputation that can never be completely erased. It can only be outlived.

The consequential damages that Stringer has suffered are inconsequential compared to the disgrace. He has suffered loss of business, he has undergone constant humiliation, worry and anxiety, which, of course, his family has shared, all by a decision of a trial judge without a scintilla of credible evidence to support it.

It is some consolation to appellant that he has saved his self-respect.

While the public may for a time consider him disgraced, he has not in reality been disgraced by the decision of a trial judge, who, in order to bolster that decision for the benefit of the public, has himself violated the law and the Canons of Judicial Ethics, heedless of the consequences to anyone except himself. Counsel for appellant doubt that Judge McCarrey realizes, even to this day, what he has done to Herald Stringer. This consideration saves Mr. Stringer from being embittered, a state of mind which itself is a punishment to the victim of injustice.

In this brief counsel for appellant have handled the facts of the case "without gloves", deeming it their duty to their client so to do. They have attacked the judicial integrity of the trial judge in plain terms, without questioning his personal integrity.

It is submitted that the judgment of the trial Court should be reversed.

Dated, Anchorage, Alaska,
September 30, 1955.

GEORGE B. GRIGSBY,
WENDELL P. KAY,
HAROLD J. BUTCHER,
EDWARD V. DAVIS,
Attorneys for Appellant.

No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,
United States Attorney,
JAMES M. FITZGERALD,
Assistant United States Attorney,
Anchorage, Alaska,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,659

IN THE

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Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant, who is an attorney at law, was charged in an Information, filed by the United States Attorney, September 24, 1953, with misconduct while in practice of his profession. After a hearing in District Court, appellant was found delinquent in those obligations required of him when dealing with his client, and was suspended from the practice of law for 120 days. The execution of the punishment has been stayed, and from the judgment he has now appealed.

Jurisdiction of the Court below is found at Section 35-2-73 of the Alaska Compiled Laws of 1949. Juris-

diction of this Court is found at 28 U. S. C. 1291 and 28 U. S. C. 1294.

STATEMENT OF FACTS.

The appellant is an attorney at law licensed to practice his profession within the Territory of Alaska.

An Information was filed the 24th of September, 1953, by Seaborn J. Buckalew, then United States Attorney, charging appellant with misconduct while in practice of his profession.

Mr. Stringer had been employed and had undertaken to represent Robert Lee Kemp in a criminal matter (United States v. Robert L. Kemp). Kemp was taken into custody May 6, 1952, by police officers at Anchorage, and charged with transporting a woman for the purposes of prostitution. The charges filed against Stringer arise from the attorney-client relationship established thereafter between Stringer and Kemp.

At the time of his arrest, Kemp was employed as a taxicab driver for the Radio Cab Company of Anchorage, Alaska. Shortly after his arrest Kemp notified his employers that he was being held in jail. After receiving notification that Kemp was being held in custody, the owners of the Radio Cab Company, James M. Lewis and Vernon Oscar Rollins, made efforts to aid Kemp. To this end they undertook to arrange an attorney for him, and Herald Stringer was chosen.

On the morning after Kemp's arrest, Stringer and Rollins together visited Kemp at the Federal jail. There a discussion took place which Kemp recalls concerned two things. It was arranged that Stringer was to represent Kemp and a fee was set for these services, and Stringer was informed of the circumstances under which Kemp had been apprehended. It is in dispute as to what arrangements were agreed upon by Stringer and Kemp as to the fee, or to what extent Stringer would represent Kemp. Whether Stringer was to undertake the defense of Kemp on the criminal charge and to receive for this a fee of $500, or whether a $100 fee was given to Stringer for arranging bail for Kemp is in issue.

Kemp was later arraigned before the United States Commissioner at Anchorage, Alaska, and bail was set in the amount of $2,500. On July 7, a surety was secured and Kemp was released from jail. After his release he immediately reported the office of the Radio Cab Company where he discussed his arrest with James Lewis. Lewis had confidence in Stringer and suggested to Kemp that Stringer might be able to keep the case out of Court. Thereupon, Lewis and Kemp together called at the law offices of Stringer and his associate Connolly, in the Central Building, Anchorage. This was to be the second meeting between Kemp and Stringer.

At this meeting the circumstances of the criminal charge then pending against Kemp were again discussed with Mr. Stringer. The amount of the fee that Mr. Stringer was to receive for his services in

Kemp's behalf was also discussed. It was finally agreed that Stringer was to represent Kemp for a fee of $2,500. Whether there were any conditions to the fee in the full amount of $2,500 is in controversy, and it is also in dispute as to what arrangements were made then for payment of the fee. Kemp recalls that $2,000 of the fee was conditioned on Stringer's ability to get the case dismissed out of Court and to recover Kemp's chauffeur's license. The chauffeur's license was important to Kemp, particularly so since he was employed by the Radio Cab Company and would be unable, in the absence of the chauffeur's license, to continue his occupation. Kemp also recalls that he was to pay Stringer $500 in cash and the remaining $2,000 was to be secured by two notes, each in the amount of $1,000.

The amount of the fee seems to have given Kemp some concern for at a later date, he consulted another attorney. This attorney, Mr. Peterson, advised Kemp that Stringer's fee was too high, and that he, Peterson, would undertake the defense of Kemp for $250. Kemp did not terminate his arrangements with Mr. Stringer, however, and called at the office of Stringer and Connolly from time to time for further meetings or conferences.

In accordance with the agreement, two notes which were intended to be security for the greater part of the fee, were drawn up sometime after the first meeting in Mr. Stringer's office. These notes, each for $1,000, were signed June 17, 1952 by Kemp, and on the same date, one of these $1,000 notes was

cosigned jointly by Mr. and Mrs. Smith, who were close friends of Kemp.

Within a few days after the notes were signed, the criminal proceeding against Kemp was dismissed by the United States Commissioner at Anchorage, at the recommendation of the United States Attorney, Mr. Buckalew. Efforts to recover Kemp's chauffeur's license were not successful, for despite the dismissal of the proceeding against Kemp, his license was retained by the Anchorage police.

Failure to recover the chauffeur's license led to a dispute between Stringer and Kemp. Payment of the notes by Kemp was not forthcoming, which led Stringer to notify the cosigners, Mr. and Mrs. Smith, that he intended to take action if necessary to compel satisfaction. Kemp then consulted Roger Cremo, an Anchorage attorney, and was referred by Cremo to the United States Attorney.

After some investigation, an Information was filed by Mr. Buckalew in the District Court for the Third Division, Territory of Alaska. This Information was not published and within a short time was withdrawn and a new Information filed. It was on this second Information that Stringer was tried in the District Court, and from the judgment of the District Court this appeal has been taken. The opinion of the District Court is reported at 124 F. Supp. 705. After this appeal was docketed a motion was made by appellant to remand the proceedings to the District Court with directions to refer the proceedings to the Alaska Bar. See *Stringer v. United States,* 255 F. 2d 676.

ISSUES PRESENTED.

Appellant has raised two issues which are set forth on page 7 of his brief. The first contention urged by the appellant is that the record contains insufficient evidence to support the Findings of Fact of the District Court. The second issue raised by the appellant questions the validity of the proceedings themselves. Appellant contends that he has not been afforded a fair and impartial hearing by the trial judge. The issues then are:

I. Does the record contain the necessary evidence to support the Findings of Fact?

II. Was appellant afforded a fair and impartial hearing by the District Judge?

ARGUMENT.

I.

DOES THE RECORD CONTAIN THE NECESSARY EVIDENCE TO SUPPORT THE FINDINGS OF FACT?

Herald Stringer has been brought into the District Court of the Third Judicial Division, Territory of Alaska, on charges of misconduct while in practice of his profession. Mr. Stringer had undertaken the defense of Robert Lee Kemp in a criminal matter, and from this attorney-client relationship stem the charges of misconduct.

The circumstances surrounding the setting of the fee by Stringer appear to be in some confusion and have caused a great deal of conflict. Much of the

testimony of the witnesses during the hearing was on this point. The written opinion of the District Judge clearly indicates the Judge's concern in the matter. Several of the Findings of Fact and Conclusions of Law deal in some part with the fee set by Mr. Stringer in the case of United States v. Kemp. In fact, appellant contends that the validity of one of the Findings of Fact will be controlling on this appeal (Appellant's Brief, p. 35). Findings of Fact II, III and IV and Conclusions of Law III, IV, V and VI are related directly to the attorney's fee.

An examination of the testimony as it is taken from the record discloses that no less than five witnesses testified more or less substantially about how the fee in the Kemp case was arrived at. Two of the five witnesses were for the Government. They were Robert Lee Kemp and Vernon Oscar Rollins. For the defense, the defendant himself testified, as did his partner, John Connolly, and finally, James Lewis. Examination of the testimony of each of the five witnesses discloses that the testimony of each will somehow differ from the testimony of the others, and in the testimony of each can be found some similarity of the others. Since the circumstances surrounding the setting of the fee are so important, the testimony of each witness will be taken up in the order of their appearance during the hearing.

Robert Lee Kemp.

Robert Lee Kemp testified on behalf of the Government, and he was admittedly the most important

witness called by the Government. Kemp recalled in his testimony that his first meeting with Herald Stringer took place at the Federal jail on the morning of May 6, 1952. He testified that present at that time, in addition to Mr. Stringer and himself, was Vernon Oscar Rollins, his employer (Tr. Vol. II, p. 267). Kemp was under arrest for having transported a woman for the purpose of prostitution. At the meeting in the jail, Kemp testified that Stringer set his fee to undertake Kemp's defense at $500. One hundred dollars was paid immediately by Rollins to Stringer as a retainer. According to Kemp, the discussion included an explanation of the circumstances which surrounded his arrest (Tr. Vol. II, pp. 267-268).

Kemp further testified that after his release from jail, he reported to the offices of the Radio Cab Company, where he then discussed his arrest with James Lewis. Mr. Lewis suggested that Stringer was a good attorney, and that possibly Stringer could keep the case out of Court. Kemp believed Lewis to be known to Stringer, and for this reason requested Lewis to join him in a visit to Stringer's office (Tr. Vol. II, pp. 272-273). There a second meeting took place between Kemp and Stringer. Present at the second meeting were James Lewis, Herald Stringer, Robert Kemp, and possibly John Connolly (Tr. Vol. II, p. 275). This time, Kemp testified Stringer demanded a fee of $2,000 in addition to the $500 which had already been agreed upon. The purpose of the additional $2,000 was to keep the case out

of Court and to recover Kemp's chauffeur's license (Tr. Vol. II, pp. 277-278). Kemp then went on to testify that arrangements were made to secure the payment of the fee to Mr. Stringer.

There were other meetings between Stringer and Kemp. At one of these later meetings, Kemp testified that the notes were drawn up which were to secure the remainder of the fee (Tr. Vol. II, p. 287). Shortly before the case was dismissed by the United States Commissioner, Lewis came to where Kemp was working to get his signature on the notes and to get the signatures of the cosigners, Mr. and Mrs. Smith. He and Lewis together went to Mr. Smith's place of employment, and Smith there declined to sign the note. Later during the same day, Lewis and Kemp met with Mr. and Mrs. Smith at the Smiths' residence, and at that time and place the Smiths jointly signed the note as cosigners (Tr. Vol. II, p. 289).

The material part of Kemp's testimony relating to the negotiations which took place between himself and Stringer at arriving at the fee are set out below. In his direct examination, Kemp was questioned concerning what was said at the meeting where he first met Stringer, and which took place at the Federal jail.

By Mr. Fitzgerald:

Q. Now, what discussion took place down there at the jail?

A. Well, as I say, I related to Mr. Stringer the circumstances of my arrest and we discussed the case and Mr. Stringer said he wanted $100 retainer fee and Pat Rollins gave him the $100

retainer fee and he said the fee for his services would be $500 and at that time, why, Pat had taken the $100 out of his pocket and gave it to Mr. Stringer.

The Court. Just a moment, please. May I interrupt at this point, Mr. Fitzgerald? Now what did you understand that was to pay at that time?

A. Well, the way I thought it was was this $500 would have been to represent me in case I came to court.

The Court. On the trial of the case in chief, or that is on the trial of the case?

A. Or anything he had to do for me.

The Court. Very well.

Mr. Fitzgerald. Is the Court satisfied with the answer of this witness?

The Court. Yes, the Court is, you may proceed, Mr. Fitzgerald.

By Mr. Fitzgerald:

Q. Was there any other discussion at that time?

A. You mean besides the case?

Q. Besides the case and besides the fee?

A. Not that I recall, although—of course, Mr. Stringer told me, I believe that he told me at that time, but I don't want to swear to it that was approximately the time he told me or whether it was in the afternoon when I was in his office, he told me it was a tough case to beat because of the fact that I was a cab driver and there had been quite a few cab drivers getting arrested and public opinion was against them. Now, this conversation might have occurred then or afterwards when I was in Mr. Stringer's office.

Q. Well, Mr. Kemp, can you tell me how well you remember this first meeting down in the jail? How well you remember the conversation that took place?

A. Well, as far as the conversation is concerned I am positive that Mr. Pat Rollins gave Mr. Stringer $100 retainer fee and that at that time Mr. Stringer said it would cost $500 for his services.

(Tr. Vol. II, pp. 267-269.)

There is no doubt in Kemp's mind as to what arrangements had been made at the Federal jail, as is shown by his further testimony.

By Mr. Fitzgerald:

Q. And how did you happen to go to see Mr. Stringer?

A. Well, Mr. Lewis and Pat Rollins had engaged him for me and the way I understood it at the time that he engaged me down at the City Jail, why I figures that he was being engaged for the entire proceedings for me.

Q. And you felt that you were going up to see your attorney?

A. Yes, sir.

(Tr. Vol. II, p. 272.)

Kemp testified that at either his first or second meeting in Stringer's office, the subject of fees was discussed again.

By Mr. Fitzgerald:

Q. Now, regardless of if it was the first or second meeting, will you tell the Court what was

said about the fees that you can recall at this time?

A. Well, I can recall Mr. Stringer told me if it didn't come to court it would cost me $2,000 plus the $500 that I owed him for representing me. Well, I was never quite sure exactly how that $500 fitted in there.

Mr. Grigsby. Let me have that answer.

The Court. $2,000 plus $500 and he was never quite sure how that $500 fitted in there.

Q. Mr. Kemp, what other terms were there in this employment contract between you and Mr. Stringer that you can recall?

A. Well, I can't recall the exact words, but the main part of it was that I didn't have $2,000 and I didn't know where I could get it and he suggested some notes and to have me have a co-signer and it was two notes; one for $1,000 which I would sign and $1,000 note with the cosigner.

Q. Were those notes signed at that time?

A. No, sir, they weren't.

Q. They were discussed?

A. Yes, sir.

Q. Do you recall any other terms of your employment contract with Mr. Stringer?

A. Well——

Q. Do you recall what he was to do for you—each and everything that he was to do for you? Did you discuss that?

A. Yes, I believe we did.

Q. Can you recall now?

A. Mr. Stringer was going to try to keep the case out of court for me and get my chauffeur's license back for me.

Q. And for that he was going to charge you how much?

A. Altogether, it would have totalled $2,500.

Q. Was he to do anything else for you?

A. No, I can't recall of anything. I won't say that there wasn't anything more discussed, but I can't remember everything that was discussed, but that was the main thing I can remember.

(Tr. Vol. II, pp. 277-278.)

Kemp's testimony at this point indicated that he believed the contract provided for Stringer to represent him for $500, but that if the case were kept out of court and if Mr. Stringer could recover his chauffeur's license, an additional $2,000 would be required. Kemp testified further about his understanding of the arrangement.

By Mr. Fitzgerald:

A. I left Mr. Peterson's office with Jim Lewis and we had a discussion about merits and Mr. Peterson defending my case and for the fee that he asked, which was quite a bit less than Mr. Stringer's and I and Jim Lewis both agreed it would be much better if possible to keep me out of court and engage Mr. Stringer to do so, rather than to take Mr. Peterson's offer of defending me for $250 and going to court on it.

Q. And when is the next time you saw Mr. Stringer?

A. We saw him that same day.

Q. You went back to see Mr. Stringer?

A. Yes, sir.

Q. And what discussion took place then?

A. I believe then we discussed the notes some more and who I would get as a cosigner and I suggested Mr. and Mrs. Smith and I believe he agreed to it.

(Tr. Vol. II, p. 286.)

Kemp's reluctance to have the case come to Court and his belief that it would be desirable if the case could be kept out of Court entirely is explained by his testimony as follows:

By Mr. Fitzgerald:

A. Well, he told me that if he didn't sign the notes so as to engage Mr. Stringer to keep the case out of court that I could stand a very good chance of getting indicted by the grand jury and a very good chance of getting convicted and he emphasized it because Mrs. Smith didn't want to sign the notes. She thought it was way too much money and although Mr. Smith was reluctant he was willing to sign them. I guess he didn't want to see me in any more difficulties and we had to convince her so we had quite a discussion on it as to what would happen to me if he didn't sign the notes.

Q. As I understand it now, it was Lewis that made these allegations, is that correct?

A. Yes.

Q. Did Mr. Stringer ever make them?

A. No.

Q. Mr. Lewis did though?

A. Only, not at that time, no. Mr. Stringer told me before that if the case would come to court I would stand a chance of getting indicted by the grand jury and if I did get convicted I would stand the chance of getting from 2 to 5 years. That was the penalty of it.

(Tr. Vol. II, p. 290.)

Kemp believed also that part of the fee was for getting his chauffeur's license back.

A. Well, I had—the only connection I can see in that was the fact that I had always understood that part of that fee was that I was paying him on the agreement of paying him that $2,000 if he—that I was to get the case dismissed and he was going to get my chauffeur's license and within that time, why, he told me that he hadn't agreed to get my chauffeur's license because he had no control over whether or not my chauffeur's license could be issued for me. He said the most he could do was to try to get them issued.

(Tr. Vol. II, p. 300.)

Kemp was examined by the Court in connection with the fee.

By the Court:

Q. What was the first time you ever discussed your chauffeur's license with Mr. Stringer, if you recall?

A. I believe the first time I discussed my chauffeur's license with Mr. Stringer was about the first meeting we had in Mr. Stringer's office and when we were discussing getting it dismissed out of court and I believe at the time he told me that with the dismissal I shouldn't have any trouble obtaining my chauffeur's license.

Q. Was that to be considered in the original $500 fee?

A. No, sir, the fee—that was for $2,000 to get my case dismissed out of court.

Q. He didn't agree with the fee of $500 to get your chauffeur's license back?

A. No, sir, never mentioned that.

(Tr. Vol. II, p. 304.)

The testimony of Robert Lee Kemp is briefly summarized. Kemp testified that he met Stringer for the first time at the Federal jail on May 6, 1952. At that time Kemp employed Mr. Stringer as attorney to defend him on a criminal charge. The fee was set at $500, on which $100 was immediately paid. Some discussion took place at that time regarding the merits of the case.

A second meeting between Kemp and Stringer took place at Stringer's law office. During this meeting, Kemp was given to understand that if the case came to Court he would be in difficulty; that he might be indicted and receive a two to five year sentence. He wanted in the worst way to keep the case out of Court and he was willing to pay $2,000 to do so. Moreover, it was his belief that if the case were kept out of Court he would be able to recover his chauffeur's license which was held by the city police.

It was understood then that Kemp was to pay $500 down in cash and was to pay $2,000 more at the conclusion of the case. The conditions for the additional $2,000 payment were that Stringer was to get the case dismissed or to keep the case out of Court, and was to recover Kemp's chauffeur's license. James Lewis paid $100 in Kemp's behalf toward the $500 immediately due. It was also understood that the $2,000 was to be secured by two notes, of which one would be cosigned, and the notes were to be drawn up at a later date.

Subsequent to this meeting, other meetings took place between Stringer and Kemp. Shortly before

this case was dismissed, James Lewis looked Kemp up and brought the notes for Kemp to sign. Kemp signed the notes and later the same day he and Lewis were able to secure the signatures of Mr. and Mrs. Smith as cosigners for one of the notes.

A few days later friends of Kemp called him to notify him that a notice had appeared in the press that the case had been dismissed. Kemp called Stringer's office and obtained an appointment. Stringer then confirmed that the case against Kemp had been dismissed. Kemp finally testified that Stringer was not able to recover the chauffeur's license and that he had not paid the notes to Stringer.

John Connolly.

The first witness for the defense to testify about the arrangements between Stringer and Kemp was John Connolly. Mr. Connolly had been in partnership with Mr. Stringer since June 1, 1952. He was not present at the meeting in the Federal jail, but testified that he was present in Mr. Stringer's office when the $2,500 fee was set. Mr. Connolly testified also that the conversation included some discussion about the merits of the case, and that Kemp was advised of the maximum and minimum penalties under the statute that he was charged with. Kemp was advised, Mr. Connolly stated, that Mr. Stringer might be able to get the case dismissed. The possibility of dismissal was, however, not considered in connection with the fee. Kemp arranged to pay $100 on the fee sometime during the day. There was no discussion whatsoever about any notes (Tr. Vol. III, pp. 484-485).

According to Mr. Connolly, the return of Kemp's chauffeur's license was not a condition of the $2,500 fee, although he stated that on one occasion Kemp was told that the case was being dismissed and Connolly then promised that he would go over and try to get the chauffeur's license back from the Chief of Police (Tr. Vol. III, p. 491). At the same meeting, Mr. Connolly stated, Mr. Stringer was informed by Kemp that he did not have the money to pay the additional $2,000 and it was therefore arranged that Kemp would sign two notes for $1,000 each. One of the notes was to be cosigned by friends of Mr. Kemp (Tr. Vol. III, p. 496).

James Lewis.

Lewis testified that he was the manager of the Radio Cab Company and had been the dispatcher on duty at the time of Kemp's arrest. After Kemp was released from jail, Lewis and Kemp held a conversation at the taxicab office (Tr. Vol. III, p. 576). In the conversation in the cab offices, Kemp inquired of Lewis about an attorney and in response to this inquiry Lewis suggested Mr. Stringer. Lewis denied, however, on cross-examination that he suggested that he might be in a position, because of his acquaintance with Stringer, to obtain the services of Stringer at a favorable fee (Tr. Vol. III, p. 594).

Lewis attended the meeting in Stringer's office when the $2,500 fee was set. Lewis testified that the fee of $2,500 was subject to no conditions whatsoever. According to Lewis, the fee was set at $500 in cash

then and $2,000 to be paid at the conclusion of the case. Lewis testified that he put up the $100 that was paid to Stringer toward the $500 immediately due. Mr. Lewis also stated that there was no mention made of any promissory notes at the meeting (Tr. Vol. III, pp. 579-581).

On cross-examination Lewis was questioned about the notes executed by Kemp. He recalls that the only discussion about notes took place at the final meeting (Tr. Vol. III, p. 606). Lewis recalls that at this meeting Kemp was advised by Stringer that the case was being dismissed and informed Kemp that the balance of the fee should be forthcoming. Kemp told Stringer that he did not have that kind of money. Stringer wanted collateral for the balance of the fee, and then, for the first time, Lewis states, discussion about the notes took place. Stringer wanted a note for $2,000, but Kemp advised Stringer that his friends would not sign a note for $2,000 and therefore, two notes were made, of which one was cosigned (Tr. Vol. III, pp. 607-608). Lewis was asked if he might explain how it was known that the Smiths would not sign the note for $2,000, and that it would be necessary to make two notes of $1,000 each. Lewis then became confused, as shown by his testimony.

> The Court. Just a moment, please. Was there anything said at that time that they wouldn't sign the $2,000 note?
>
> A. I believe there was.
>
> The Court. What was the discussion about?
>
> A. They were skeptical about signing a $2,000 note.

The Court. Who?

A. The Smiths, according to Mr. Kemp. He said that the Smiths, or they either said, or it was presumed that they were skeptical of signing a $2,000 note.

The Court. Now, was that discussed at that time?

A. The note, you mean?

The Court. No, the signing of the note by the Smiths, the $2,000 note.

A. No, I don't believe it was. Let me see—I don't know whether—it could be that it is a presumption on my part that I got that in my mind, I don't know which, that they would not go the $2,000 note because I am thinking back. I found out later they didn't want to sign the $2,000 note.

The Court. And didn't you find that out while discussing that feature of the case with counsel?

A. I don't know whether I did or not.

(Tr. Vol. III, pp. 608-609.)

To summarize Lewis' testimony, he first recommended Stringer to Kemp. He went to Stringer's office with Kemp and a fee was set in the amount of $2,500, of which $500 was immediately required. He loaned Kemp $100 to pay on the $500 then due. Lewis was present at almost all of the meetings, with the possible exception of one. He was present at the final meeting when he states Stringer advised Kemp that the case against him was to be dismissed and demanded the remainder of his fee. Lewis testified that Kemp then let Stringer know that he did not have that kind of money, and for the first time, the question of what arrangements should be made to

secure payment of the remaining $2,000 was discussed. He states that although Stringer wanted a $2,000 note, Kemp refused since Kemp's friends, the Smiths, would not sign a $2,000 note. Two notes were then drawn in the amount of $1,000 each; one of the notes being cosigned by the Smiths. It is apparent from the testimony of Lewis that he was greatly concerned in the Kemp case. That matter will be treated a little later in this argument.

Herald Stringer.

The defendant took the witness stand on his own behalf and testified in connection with the fee. Mr. Stringer testified that at the Federal jail he received $100, paid on behalf of Kemp, to arrange Kemp's release on bail. There was no discussion at that time about retaining Stringer as counsel in connection with the charge on which Kemp had been arrested (Tr. Vol. IV, p. 768).

Stringer testfied that after Kemp's release from jail, Kemp came to his law office, accompanied by Mr. Lewis, and requested Stringer to defend him. The circumstances concerning the Kemp case were discussed, and Stringer advised Kemp that his case was a serious one. Stringer set a fee in the amount of $2,500, of which $500 was to be paid as retainer (Tr. Vol. IV, p. 769). According to Stringer, nothing was said about Kemp's financial ability to pay. After the fee was set, Stringer requested that the dispatch sheets of the Radio Cab Company be made available, which would corroborate the story of Kemp and

which would tend to exonerate him (Tr. Vol. IV, p. 770).

Stringer testified that the notes were drawn up in his office at the meeting when Kemp was advised that the case was being discussed. The notes were drawn up in the amount of $1,000 each; one of them was taken out by Kemp and Lewis so that the signatures of the cosigners could be obtained (Tr. Vol. IV, pp. 784-785).

On cross-examination Mr. Stringer testified that at the first meeting in his office with Kemp, May 8, 1952, he foresaw the possibility of getting the case dismissed (Tr. Vol. IV, pp. 807-809).

Vernon Oscar Rollins.

The final witness who testified about Mr. Stringer's fee was the Government's first rebuttal witness, Vernon Oscar Rollins. Rollins was part owner of the Radio Cab Company, and as such, one of Kemp's employers.

Rollins was at the first meeting between Stringer and Kemp at the Federal jail. Rollins gave Stringer $100 at this time, and testified as to what his recollection was of the arrangements made at the jail.

By Mr. Fitzgerald:

Q. Can you tell the Court now what you can recall, to the best of your ability, about that discussion?

A. Well, we were talking about a retainer fee for Stringer which was $100 and the conversation has been so long I don't know what it—I cannot

truthfully state what the conversation, how it led around—what it was I don't know.

Q. Well, if you can't recall the words can you tell us in effect what was said?

A. The only thing that I can definitely remember on it is the retainer fee. That is about the conversation I know was in regards to the case, but what it was about I couldn't state what went on.

Q. Could you tell us now about the retainer fee?

A. Well, I think $200 was supposed to have been the original retainer fee, but I had the $100 there and—maybe it was just $100, I don't recall for sure, and that was supposed to be a retainer on $500. That is what I understood.

Q. Do you recall what the $500 was supposed to have been for?

A. That was, as far as I understood, was supposed to be Stringer's fee.

(Tr. Vol. IV, pp. 856-857.)

On cross-examination Rollins again testified as to what his understanding was of the arrangements made at the Federal jail.

By Mr. Kay:

Q. And I believe that you referred to those sums in your direct testimony, did you not, as used the word "retainer" in connection with them?

A. Yes, I was under the impression that the $100 was the retainer on a $500 fee.

Q. Now, is that clear in your mind, definite, or is that as hazy as the other?

A. It is pretty clear.

(Tr. Vol. IV, p. 861.)

Rollins' testimony was that he heard about the $500 fee prior to going to the jail, and that he heard this from James Lewis.

By Mr. Kay:

Q. Well, just reading that portion of the transcript then, Mr. Rollins, are you of a firm impression which I believe you stated previously that the $500 you may have heard, the $500 mentioned, either just before going to the jail or at the jail or just after?

A. I heard the $500 prior to going to the jail.

Q. I see. Did you hear it from Mr. Stringer?

A. Jim Lewis.

Q. All right.

The Court. That is your considered opinion, is it?

A. Yes, sir.

The Court. And what has caused you to testify now that you heard that from Jim Lewis?

A. Jim Lewis was the only person that could have told me. Mr. Stringer did not tell me, and as he sent me up there with the $100 or to go up there for the retainer fee he is the only person I could have heard it from.

The Court. But, it is still your testimony that your understanding was, is it, that the total fee was $500?

A. My understanding was that $500. I not only got that from that one conversation, but afterwards with Jim Lewis and myself. It was my impression.

The Court. Very well.

(Tr. Vol. IV, pp. 875-876.)

The Findings of Fact rest substantially on the evidence heretofore reviewed.

Finding of Fact II:

> On or about the 8th day of May, 1952, there was a contract entered into between the defendant Herald E. Stringer, and Robert L. Kemp, the basis of which was that the defendant would represent Robert L. Kemp on a white slavery complaint which had been filed against Robert L. Kemp for the sum of $500.00, and further, this contract was made when the defendant went to the Federal jail and discussed the case with Robert L. Kemp and Pat Rollins. Defendant was at that time paid $100.00 of the $500.00 fee.

The finding is supported by the testimony of Robert Kemp and Vernon Oscar Rollins. Neither John Connolly or James Lewis, witnesses for the defense, were present at the meeting in the Federal jail. The testimony of Kemp and Rollins is in conflict with that of Mr. Stringer. Mr. Stringer contends that he was employed for the purpose of securing the release of Kemp on bail. According to Kemp, on the first meeting with Mr. Stringer at the jail, the fee was set at $500. He testified that the circumstances of his arrest were related and that the case was discussed (Tr. Vol. II, p. 267). A discussion of the case and the circumstances of the arrest would naturally precede the preparation of a defense.

Finding of Fact III:

> There was a second fee set by the defendant in the sum of $2,500.00 in the defendant's office, the exact time being in dispute.

The testimony of all who took part in the first meetings in Stringer's law office agree that a fee

of $2,500 was set. The dispute in the time appears to be from the uncertainty of the time of Kemp's release from jail and his arrival at Mr. Stringer's office (Tr. Vol. II, pp. 275-277).

Finding of Fact IV:

> That Robert L. Kemp was led to believe that one fee would be charged to settle the case out of Court, where another would be exacted if the case went to trial, thereby implying at least that it would take a greater amount to keep the case out of Court than to try the case in Court.

This is in accord with Kemp's testimony (Tr. Vol. II, pp. 278-300). Apparently Kemp wanted to keep the case out of Court. He was in some fear that if the case went to Court he would be convicted. This fear was expressed to others, as is shown by the testimony of Mrs. Mildred Smith (Tr. Vol. IV, p. 898). For this reason he did not choose to exchange attorneys, since he could have employed Mr. Peterson for $250 (Tr. Vol. II, p. 282). Robert Kemp relied upon Mr. Stringer to keep the case out of Court and he was willing to obligate himself for $2,000 on the possibility that the case might be dismissed. Mr. John Connolly, James Lewis and Mr. Stringer all testified that the fee of $2,500 carried no conditions.

Finding of Fact V:

> That the relationship of attorney-client was established between the defendant and Robert L. Kemp at the time the defendant visited Robert Kemp in the Federal jail.

This finding, of course, depends upon the testimony of Kemp and Rollins. Mr. Stringer would admit that an attorney-client relationship between himself and Mr. Kemp existed only to the extent that he would prepare the necessary bond to secure the release of Kemp from jail.

Findings of Fact VI and VIII are treated together:

> That there was an overreaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.
>
> That the defendant, in violation of the trust and confidence of his client, knowingly failed to advise his client concerning the status, merits and probable outcome of his client's case.

Kemp had little previous experience with either courts or lawyers (Tr. Vol. II, pp. 308-309). He was advised by Mr. Stringer that he faced a very serious charge. His testimony on the point is not disputed by either Mr. Connolly, Mr. Lewis or Mr. Stringer. All agree that Kemp was advised that the charge was a very serious one. Kemp was placed in fear of what might happen to him. He conveyed his fear to Mrs. Mildred Smith, who testified as follows:

By the Court:

> Q. Mrs. Smith, were you afraid at that time of anything, that is, the time that you signed the promissory note?
>
> A. I was afraid that Bobby would go to the penitentiary.

Q. Why were you afraid of that?

A. Well, from the impression in the very beginning, the very beginning, because he wouldn't stand trial they said he didn't have a chance.

Q. He said he didn't——

A. Bobby said he was too scared to have a trial. We begged and begged and he wouldn't have a trial.

(Tr. Vol. IV, p. 898.)

Kemp was charged with the crime of "transporting for the purpose of prostitution." The charging part of the complaint was as follows:

> "The said Robert Lee Kemp in the Territory of Alaska, within the jurisdiction of this Court, did wilfully feloniously and unlawfully, *on the 6th day of May, 1952, at approximately 12:45 a. m. did transport for the purpose of prostitution* contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

The complaint, on its face, is patently defective. It does not state whether it was brought under the territorial statute or the Federal Mann Act. It does not allege that the defendant transported a female from place to place. It does not meet the requirements of either statute (See 65-9-19 ACLA 1949 and 18 U. S. C. A. 2421).

During the first meeting at Mr. Stringer's law office, some inquiry was made into the circumstances surrounding the arrest of Kemp. At that time, it was

determined that the dispatch sheets and the radio log of the Radio Cab Company were available (Tr. Vol. II, p. 598; Tr. Vol. IV, p. 770). Lewis, who had been the dispatcher on the night in question, was present. These dispatch sheets and the radio log would show that Kemp had been dispatched by the Radio Cab Company to pick up his fare. With this information it is questionable whether the Government ever had a case against Robert Kemp. Certainly, the United States Attorney dismissed the matter without any further proceedings. Mr. Buckalew, in his cross-examination, stated that he never seriously intended to prosecute Kemp and that when he became aware of the dispatch sheets, as far as he was concerned, the case was without merit (Tr. Vol. II, p. 395).

Yet all the witnesses who were in a position to know testified that Kemp was informed that the case against him was a tough one, and that he stood a good chance of being indicted and sentenced to imprisonment for a term of two to five years.

Finding of Fact VII:

> That one James Lewis who was part-owner of the Radio Cab Company for whom Robert L. Kemp worked, and who was the dispatcher of the company at the time the original incident occurred, acted for the defendant in his dealings with Kemp.

This finding states simply that James Lewis was acting on Mr. Stringer's behalf. Lewis played an important part in the Kemp case. Rollins stated that

he was advised by Lewis before going to the Federal jail that Stringer wanted $500 and would require a retainer of $100 (Tr. Vol. IV, p. 875). Rollins had the $100 to pay Stringer on the morning of May 6.

Kemp testified that Lewis suggested that Stringer might keep the case out of Court and suggested the first visit to Stringer's law office (Tr. Vol. II, pp. 272-273).

Lewis, by his own testimony, attended every meeting between Kemp and Stringer at Mr. Stringer's office, except that he might have missed one. He went up there at other times on the Kemp case (Tr. Vol. III, pp. 603-605).

James Lewis also accompanied Kemp to Mr. Peterson's office. Kemp testified that Lewis opposed the employment of Mr. Peterson. Further, that Lewis encouraged Kemp to continue the contract with Stringer (Tr. Vol. II, p. 283).

Lewis also took part in getting the Smiths to cosign Kemp's note for $1,000. Kemp's testimony is that Lewis brought the notes to Kemp's place of employment to get the note signed; that Lewis went with him to Mr. Smith's place of employment to get the note signed, and when this failed Lewis accompanied Kemp to the Smiths' residence to get their signatures on the notes (Tr. Vol. II, p. 287). Mrs. Smith testifies on that instance as follows:

By Mr. Fitzgerald:

Q. Now, can you recall any of the statements that Mr. Lewis made at that time?

A. Well, as much as I can remember, he just said—Mr. Lewis said if Bobby didn't sign the note for the charges against him that it meant imprisonment from one year to two—or one year to five, I don't remember.

Mr. Lewis paid Mr. Stringer $100 at the time the fee of $2,500 was set. Kemp did not have the money. Lewis testified that the notes securing $2,000 of the fee were not drawn up until the last meeting. John Connolly and Herald Stringer also testified to the same effect. Kemp testified that the notes were discussed soon after the $2,500 fee was set in Stringer's office, and that the notes were drawn up sometime between then and the final meeting, when he was told that the case was dismissed. Lloyd Arthur Smith testified that the notes had been discussed prior to the time that they were brought to him to sign (Tr. Vol. IV, p. 927).

The conflict in the testimony in the *Stringer* case is apparently irreconcilable. Some explanation is possible when it is understood that the events took place in May, 1952, and the proceedings against Mr. Stringer did not come to trial until June 17, 1954.

In his opinion the trial judge stated that although witness Kemp was impeached in certain respects, his testimony was not completely deprived of value (Tr. Vol. I, p. 121). This appears to be in accord with the general rule that the trier of fact need not reject the entire testimony of a witness who has been impeached (*Liberty Mutual Insurance Company v. Thompson,* 171 F. 2d 723).

Judge McCarrey found, on the other hand, that the defense had failed to produce evidence which he felt was within their power to produce. The judge further stated that there was a lack of inconsistency and spontaneity. As he said in his opinion, "This absence of inconsistencies and lack of spontaneity persuade me that the defense witnesses were exceedingly well-rehearsed at pre-trial discussions and precluded me from giving their testimony too much weight." (Tr. Vol. I, p. 122). The credibility of witnesses in a disbarment proceedings is a question to be determined by the trial judge. (*In re Salus,* 184 A. 69). As a general rule, in any proceedings the responsibility for determining credibility of the witnesses is placed upon the trier of fact.

The Findings of Fact in the disciplinary proceedings against Herald Stringer rest upon the testimony reviewed. The Findings of Fact of the trial judge of the disciplinary proceedings will not be disturbed if they rest upon sufficient evidence (*Wilhelm's* case, 112 A. 560, 562). The Court of first instance knows the lawyer, his standing, character, credibility and fidelity to trust in a way that the Appellate Court cannot (*In re Salus,* 184 A. 69, 70).

II.

WAS APPELLANT AFFORDED A FAIR AND IMPARTIAL HEARING BY THE DISTRICT JUDGE?

The appellant having challenged the sufficiency of the evidence then directs his attack to the manner

in which the case was tried by the judge. Appellant claims that he did not have a fair trial and charges misconduct on the part of the judge. Several grounds are relied upon. First, appellant urges that the District Judge should have disqualified himself from hearing the case. Secondly, appellant argues that the District Judge acted improperly and that he assumed to act both as prosecutor as well as judge in the trial of the case. Finally, it is urged by appellant that the District Judge demonstrated his bias and prejudice against the defendant throughout the trial.

Judge McCarrey, on February 2, 1954, sent the file in the *Stringer* case from the Third Judicial Division of the Territory of Alaska to the Fourth Judicial Division. It was the intention of Judge McCarrey that the matter would be heard by Judge Pratt, who would come to Anchorage. Judge McCarrey was reluctant to hear the *Stringer* case because of his own personal relationship with Herald Stringer and therefore intended to disqualify himself. However, Judge Pratt refused to hear the matter and returned the file of the case to the Third Judicial Division, Anchorage, on February 4, 1954 (Tr. Vol. I, pp. 152-153).

Counsel for appellant then sought to invoke provisions of the territorial law permitting referral of charges against attorneys to three disinterested members of the Bar Association. If such referral were made, the evidence would be taken by a committee of the Bar and in due time, the recommendation of the committee would be filed with the District Court. The pertinent section of the Alaska Code pro-

viding for this procedure is found at Section 35-2-77 ACLA 1949.

Judge McCarrey denied the defendant's motion of reference and filed a Memorandum Opinion in accordance with his decision on March 4, 1954 (Tr. Vol. I, pp. 58-62). In his Memorandum Opinion, Judge McCarrey pointed out that he had previously expressed his own personal opinion that he should disqualify himself because of political and personal relationships with Herald Stringer. The Court stated that although he personally was of the opinion that he should disqualify himself, counsel for Stringer had repeatedly expressed their opinion that he was qualified to hear the case, and on these expressions as well as his inability to refer the matter to the Bar, the Court felt that it was his duty to hear the matter (Tr. Vol. I, p. 61). It is at once apparent that Judge McCarrey was reluctant to try the *Stringer* case and would have disqualified himself, but that he also felt it was his duty under the existing circumstances to hear the case.

The judge left a way out, however, should either litigant wish to make objection. In the concluding part of his Memorandum Opinion, Judge McCarrey allowed both parties three days in which to file an Affidavit of Disqualification if they so desired. Judge McCarrey strongly indicated that if such an affidavit were filed, the *Stringer* matter would be referred to Judge Folta of the First Judicial Division (Tr. Vol. I, p. 62). No affidavit was ever filed.

Disqualification of a District Judge may be accomplished under Federal statutes in either of two different ways. One of the two methods is applicable to the Territory of Alaska and the other is not. Both provisions spring from the same source and are found as Sections 20 and 21 of the Judicial Code, commonly referred to as the Act of March 3, 1911, 61st Congress, 36 Stat. 1090.

Section 21 of the Act of March 3, 1911 may now be found at 28 U. S. C. 144. Under this provision of law, either party to a proceedings in District Court may file an Affidavit of Personal Bias and Prejudice against the judge before whom the matter is then pending. If the affidavit is sufficient, the judge will be disqualified and another judge assigned to hear the proceedings. This statute does not apply to the Territory of Alaska (*Tjosevig v. United States* (CA 9) 225 F. 5).

Section 20 of the Act of March 3, 1911 does apply to the Territory of Alaska. It is found in slightly modified form at 28 U. S. C. 455. It has been made applicable to Courts of the Territory of Alaska by the enactment of law found at 28 U. S. C. 460. There are few annotations to this particular section of the Judicial Code. It has been held, however, that the failure of a District Judge to disqualify himself is not jurisdictional, nor are his actions void merely because of the existence of a disqualifying ground. It appears that the consent of the parties will authorize a judge subject to the statute to continue in the exercise of

his jurisdiction (*Utz & Dunn Company v. Regulator Company* (CA 8) 213 F. 315).

The decision of a trial judge to disqualify himself or not is left to his own judicial discretion. It must be shown that his discretion is arbitrary or capricious in order to constitute reversible error (*Voltman v. United Fruit Company* (CA 2) 147 F. 2d 514).

It may or may not be that on the facts of the *Stringer* case that a disqualifying ground existed under which Judge McCarrey might have disqualified himself. It should not be necessary to decide that question since appellant has failed to make an adequate showing that in his discretion Judge McCarrey acted either arbitrarily or capriciously. It appears that both sides apparently consented, in fact, to trial of the case before Judge McCarrey (Appellant's Brief p. 46).

The Code for the Territory of Alaska includes an act under which a party litigant may move to disqualify a judge in a proceedings for reasons of bias or prejudice. That provision of the law of Alaska is found at 54-2-1 ACLA 1949. It is necessary, if a party litigant is to avail himself of this Act, that an affidavit of bias or prejudice be filed. No attempt was made at any time to invoke this grounds in order to disqualify Judge McCarrey (Appellant's Brief, p. 46).

That Judge McCarrey may have ruled adversely to appellant is not grounds to rely upon to prove abuse of judicial discretion under 28 U. S. C. 455

(*Wilkes v. United States* (CA 9) 80 F. 2d 285, 289; *Benedict v. Seiberling,* 17 F. 2d 831, 836).

Appellant's contention that the trial judge committed reversible error in failing to disqualify himself is unsound. Appellant has failed to make an adequate showing that Judge McCarrey, in the exercise of his own judicial discretion, acted capriciously or arbitrarily by failing to disqualify himself, nor did the defense make any effort to disqualify the judge prior to the time of hearing. It appears that the contrary is true and that the defense urged Judge McCarrey to try the case.

Appellant has included in his argument on this point, allegations that other parties besides Herald Stringer were put on trial during the hearing (Appellant's Brief, p. 51). The argument advanced by appellant appears, upon examination, to be outside of the merits of the case on appeal. It bears no relationship to the issue of Herald Stringer's guilt or innocence and should, therefore, be disregarded.

Appellant contends that the trial judge assumed to act during the trial as both prosecutor and judge. The appellant, in order to prove his contentions, sets forth several instances which he believes to demonstrate the soundness of his position. He has pointed out that the trial judge examined the Government's witness Kemp prior to cross-examination by defense

counsel. Further, that the witness Kemp was recalled back to the witness stand by the judge on one occasion.

Counsel next refers to the examination of the defendant Herald Stringer by the judge, and it is suggested that Judge McCarrey interrupted the examination of witnesses in instances too numerous to mention for lack of space (Appellant's Brief, p. 58).

Finally, appellant relies upon the desire of the Court that Kemp remain available to the Court after the conclusion of his testimony. The Court indicated that Kemp might be recalled. From this alleged misconduct appellant argues: That the trial judge had the opportunity to interview Kemp during recesses of the Court and since the judge had assumed to act as prosecutor, it was consistent with that assumption that he interview all his witnesses during recess, in chambers or anywhere else. The inference is clear; it contemplates a most serious charge of misconduct against the trial judge. A charge of this character should not be lightly made and on the record here, is not justified. A trial judge is allowed a good deal of discretion in examining witnesses. Authority seems to support the position that the trial judge is more than an umpire, but has a positive duty in getting at the truth (*Montrose Contracting Inc. v. Westchester County,* 94 F. 2d 580, certiorari denied, 304 U. S. 561; *Ochoa v. United States,* 167 F. 2d 341).

The cases cited above are jury cases. Presumably, a trial judge would be more cautious in examining witnesses before a jury since the jury might be influenced either by the type of questions put, or by the

extent of the examination. Where trial is before the Court, no danger exists of prejudice in the minds of the jury. Very little authority can be found on the precise point. In *Wilhelm's* case (112 A. 560, 562), the Supreme Court of Pennsylvania held that an attorney is an officer of the Court and when his conduct is in question it is proper for a judge to interrogate witnesses.

The appellant contends that the trial judge was hostile to the defendant, and the appellant again takes from the record some of the evidence on which he relies to support the allegation. Counsel contend that the trial judge cautioned the defendant of his oath when the defendant was on the stand (Tr. Vol. IV, p. 771). He states that the hostility and unfairness to Stringer is revealed in part of the opinion written by Judge McCarrey, and sets out the particular part relied upon at page 62 of his brief. The substance of this excerpt of the opinion is that Kemp advised Stringer that he did not have any money; that Stringer agreed to accept a note for $2,000; and pointed out that the Court found that $200 had been paid on the fee of $2,500; and pointed out that it was never explained to the Court why Stringer was willing to accept a $2,000 note when the amount unpaid amounted to the sum of $2,300. The appellant argues that the opinion is, therefore, in conflict with the testimony of the defendant.

And finally, appellant contends the trial judge demonstrated his unfairness by his refusal to allow the defendant to file an exhibit after the defense had

rested their case. The matters relied upon by appellant again appear to be matters in which the trial judg is granted some discretion. For instance, it is within his sound discretion to allow additional evidence to be taken after the litigants have rested their case only if he feels that such evidence is necessary (*Gulf Refining Co. of Louisiana v. Phillips,* 11 F. 2d 961, certiorari denied, 273 U. S. 697; *Philadelphia & T R Co. v. Stimpson,* 39 U.S. 448). In substance, however, the evidence relied upon, as set forth in appellant's brief, to demonstrate the hostility of the District Judge, fails to achieve its end.

It is on the basis of the evidence as set forth in the brief of appellant, and on the record, that grave and serious charges are made against Judge McCarrey. Careful examination of the record does not disclose evidence upon which to base the charges which have been made. This appeal should not be the occasion or provide, perhaps, the opportunity to make such charges.

CONCLUSION.

The trial Court found that Herald Stringer, as an attorney at law, was guilty of practices which justified his suspension from his profession for 120 days.

It was in the Judge's discretion to give the testimony of the witnesses such credibility and weight as appeared to him to be justified. The testimony of the witnesses is beyond reconciliation, and left the trial judge with the alternative of selecting the testi-

mony of either one group of witnesses or the other. In the main, the Judge accepted the testimony of Robert Kemp, Vernon Oscar Rollins, Lloyd Smith and Mrs. Smith as against the testimony of the defendant, Herald Stringer, John Connolly, his partner in the practice of law, and defense witness James Lewis.

The appellant has failed to show that Judge McCarrey should have disqualified himself, and their attempts to show he was hostile to the defendant and conducted himself improperly are not justified on the grounds set forth by appellant. In the final analysis, however, the case must be reviewed and determined on the record as a whole. Appellee rests on the record itself to sustain the judgment of the trial Court.

Dated, Anchorage, Alaska,
December 13, 1955.

Respectfully submitted,

WILLIAM T. PLUMMER,
United States Attorney,

JAMES M. FITZGERALD,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

GEORGE B. GRIGSBY,
EDWARD V. DAVIS,
HAROLD J. BUTCHER,
WENDELL P. KAY,
Box 799, Anchorage, Alaska,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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REPLY BRIEF OF APPELLANT.

I.

ARGUMENT.

1.

FINDINGS OF FACT.

The Findings of Fact appear in full on pages 8 and 9 of appellant's opening brief.

Finding of Fact II is set forth on page 8 of appellant's opening brief.

It states in substance and effect that the defendant, Herald E. Stringer, in the Federal Jail, contracted with Robert L. Kemp to defend him in a white slavery case for a fee of $500.00.

There is no testimony in the record that appellant visited Kemp in jail on any other occasion. Whatever

else may have been discussed between Kemp and appellant at that time, it will be conceded that the matter of arranging bail *was* discussed.

On the trial of the case both Kemp and his friend Vernon Oscar Rollins testified positively that during the discussion between appellant and Kemp at the jail, appellant agreed to defend Kemp on the white slavery charge for a fee of $500.00.

On cross-examination Rollins repudiated his testimony on direct examination, and swore that he never heard it mentioned at the jail, by Stringer or anyone else; that he heard it mentioned by Jim Lewis before he went to the jail.

Brief of Appellant pp. 17-18, Tr. p. 875.

The trial commenced June 17, 1954. In our opening brief we did not call attention to the fact that we took Kemp's deposition on September 22, 1953, nine months before Kemp testified at the trial.

Kemp's recollection as to the circumstances of his employing appellant Stringer to defend him was presumably better when his deposition was taken than nine months later, and especially because Ass't. U. S. Attorney Talbot had interviewed him for 10 or 15 hours a few days before his deposition was taken, necessarily refreshing his memory as to Stringer's employment.

Tr. Vol. II, p. 222.

Yet nowhere in a 24 page deposition did Kemp state that a $500.00 fee was agreed upon or even mentioned at the jail, although he was questioned

expressly as to whether anything was said, at the jail, about a fee.

Tr. Vol. I, p. 11.

If an agreement for a $500.00 fee had been made at the jail Kemp could not possibly have failed to mention it in his deposition.

There were two informations against Stringer filed in this case. Ass't. U. S. Attorney Talbot drew them both. The first was signed by U. S. Attorney Seaborn J. Buckalew on September 15, 1953.

It was admitted in evidence as Defendant's Exhibit A.

Tr. Vol. III, p. 465.

Immediately after Kemp's deposition was taken, September 22, 1953, Talbot drew the information on which the case was tried.

In that information there was no allegation that a contract for a fee of $500.00 was made in the Federal Jail.

In neither the first or second information was there any allegation that a contract for a fee of $500.00 was made in the Federal Jail.

The inevitable conclusion is that no such contract was made in the Federal Jail; that whatever contract was made between Stringer and Kemp, as to the fee to be charged for the defense of Kemp, was made in the appellant's office, and when the parties were dealing at arm's length.

After being released from jail and before going to Stringer's office Kemp went to the Radio Cab office

and asked James Lewis what to do about employing counsel. He did not mention anything about having already hired Stringer for $500.00.

Appellant's Opening Brief, pp. 15-16.

If an agreement for a fee of $500.00 had been made at the jail, Kemp could not possibly have failed to tell Lewis about it. As shown above, he could not possibly have failed to mention it in his deposition.

Finding of Fact II is based solely upon Kemp's testimony. Vernon Oscar Rollins repudiated his corroborating testimony.

In the Court's opinion, Vol. I, p. 121, it is stated,

"Although the witness Kemp was impeached in certain respects, his testimony was not completely deprived of value."

Kemp *was* impeached *in certain respects* by his own inconsistent and contributory statements.

He was impeached by several highly reputable witnesses, including an Ass't. U. S. Attorney, the Chief Deputy Marshal, and the Chief of Police, as to moral character, and truth and veracity.

He was corroborated by no one, as to any material fact in dispute.

This impeached government witness was, in the language of Ass't. U. S. Attorney, James Fitzgerald,

"The only one important government witness."

Tr. Vol. IV, p. 947.

On the testimony of Kemp and Kemp alone, the Court based Finding of Fact II.

Finding of Facts II and VII are the two most important Findings in the case. Finding VII is, in effect, that James Lewis acted for the defendant Stringer in his dealings with Kemp. There is not one scintilla of evidence to support Finding of Fact VII.

There is no allegation in the information that Lewis was Stringer's agent.

The name Lewis is not even mentioned in either of the informations.

Nowhere in Appellee's Brief is it argued that the Court's Findings of Fact are justified by the evidence in the case.

Likewise in the trial of the case, when at the conclusion of the arguments, the trial court repeatedly pressed the U. S. Atty. to express his opinion and make a recommendation as to how the case should be decided, the U. S. Attorney refused to do so.

Vol. IV, pp. 937-941.

Finally after several conferences with his assistants the U. S. Attorney made the statement appearing in the record.

Vol. IV, pp. 940-941.

In the Conclusion of Appellee's Brief it is stated, page 40,

"It was in the Judge's discretion to give the testimony of the witnesses such credibility and weight as appeared to him to be justified."

It was not only in the Judge's discretion, it was his duty to give the testimony of the witnesses such credence as appeared to him to be justified.

But to sustain the Court's Findings there must have been at least some substantial credible evidence in support of Kemp's. There was no such evidence.

In fact the testimony of Kemp was demonstrated to be of no value whatever, having been conclusively impeached as heretofore shown.

The U. S. Attorney rests on the record, but does not point out wherein the record sustains the Findings of Fact.

2.

MISCONDUCT OF THE COURT.

Appellee's Brief asserts that appellant made a "most serious charge of misconduct against the trial judge" which on the record was not justified. This assertion refers to pages 56-58 of Appellant's Brief.

In support of Appellee's above assertion Appellee cites *Montrose Contracting Inc. v. Westchester County,* 94 F. 2d 550, and *Ochoa v. United States,* 167 F. 2d 341.

The first case cited upholds the right and duty of the court to participate in the examination of witnesses when the exigencies of the case require it—See opinion, 94 F. 2d p. 583 (6).

In the second case cited it is held that, "A federal judge has right and duty to facilitate by direct participation the orderly progress of a trial, and queries which aid in clarifying testimony of a witness, expe-

dite examination or confine it to relevant matters are proper if made in a nonprejudicial manner."

Ochoa v. U. S., 167 F. 2d 341, syllabus 3.

Appellant's Brief charged *undue* interference and participation in the examination of witnesses in violation of Canon 15 of the Canons of Judicial Ethics. The record justifies that charge.

As stated on page 58 of Appellant's Brief, since the Judge, "had assumed the right to act as prosecutor it was consistent with that assumption that he interview all his witnesses, during recesses, in chambers, or anywhere else. If he had the right to act as prosecutor, he had all the rights and duties of a prosecutor."

The trial judge did take over the conduct of the case. If laxity of the prosecution required such action, he was justified, since he could not completely prosecute without a pre-examination of the government witnesses.

It *was* consistent with his assumption of the role of prosecutor, that he interview his witnesses.

Appellant's charge is that there was no excuse for this conduct. The exigencies of the case did not require it.

At the conclusion of the trial he complimented the U. S. Attorney's office for its vigorous prosecution of the case.

Tr. Vol. IV, p. 934.

Appellant agrees with most of the legal principles supported by citations in Appellee's Brief.

In Re Salus, 184 A. pp. 69-70, is cited in support of the proposition that certain evidence was held sufficient to sustain a decree of disbarment for unprofessional conduct in employment and payment of runners to solicit business.

Appellee's Brief, p. 32.

Counsel for Appellant agrees with the decision in the *Salus* case but were not aware that Mr. Stringer was charged with employing a "runner" to solicit business.

There was an insinuation to that effect made by the trial judge.

Appellant's Brief, p. 41.

There was no testimony in support of such an accusation and no Finding of Fact to that effect.

The insinuation was unwarranted, and attention was called to it in Appellant's Brief for the purpose of showing the court's hostility to Stringer, which it did show.

Appellee cites *Wilhelm's* case, 112 A. 560, 562.

Appellee's Brief, p. 32.

Appellant agrees that the evidence in *Wilhelm's* case supported the Findings of Fact.

Appellee cites *Utz and Dunn Company v. Regulator Company,* 213 F. 315, and *Voltman v. United Fruit Company,* 147 F. 2d 514.

Appellee's Brief, p. 36.

These decisions announce correct legal principles.

But appellant's complaint against Judge McCarrey is that he erred in entering upon the trial of the case

when being of the opinion that it was improper for him to sit on the trial, as he had repeatedly stated that he would require the defendant Stringer to prove his innocence. Appellant did consent to being tried by Judge McCarrey. Appellant and his counsel believed that he could establish his innocence, and now believe that his innocence was established as has been demonstrated in Appellant's Brief.

Appellee cites *Gulf Refining Co. of Louisiana v. Phillip,* 11 F. 2d 961, and *Philadelphia and T. R. Co. v. Stinson,* 39 U.S. 448, as authority for the principle that a trial judge can in his discretion allow a case to be reopened after both litigants have rested only if he feels such evidence is necessary.

Appellant Stringer asked that an Exhibit be admitted which corroborated his oral testimony. It was grossly unfair of the trial judge to refuse this request, as has been demonstrated in Appellant's Brief.

Counsel for appellant reiterate that the appellant did not have a fair trial.

Counsel for appellant are mystified by the last paragraph preceding Appellee's Conclusion, on page 40 of Appellee's Brief, particularly the language,

"This appeal should not be the occasion or provide, perhaps, the opportunity to make such charges."

This appeal is taken for the sole purpose of reversing the judgment of the trial court.

II.

CONCLUSION.

Appellant believes that it has been demonstrated to this appellate court,

First: That the Findings of Fact are not founded on substantial evidence.

Second: That appellant did not have a fair trial.

Appellant rests upon the record to reverse the judgment of the trial court.

Dated, Anchorage, Alaska,
April 11, 1956.

GEORGE B. GRIGSBY,
EDWARD V. DAVIS,
HAROLD J. BUTCHER,
WENDELL P. KAY,
Attorneys for Appellant.